AUG 1 197
MICHAEL RODAK, JR.,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-48

LOCAL 391, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, ET AL., *Petitioners*

v.

PILOT FREIGHT CARRIERS, INC., *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

HUGH J. BEINS
3812 Kanawha St., N.W.
Washington, D.C. 20015

RENN DRUM
206 Pepper Building
Winston-Salem, N.C. 27101

Attorneys for Petitioner Local 391 and Individual Petitioners

GEORGE KAUFMANN
1735 New York Avenue, N.W.
Washington, D.C. 20006

Of Counsel

DAVID PREVIANT
GERRY MILLER
211 West Wisconsin Avenue
Milwaukee, Wisconsin 53203

L.N.D. WELLS, JR.
8204 Elmbrook Drive
Dallas, Texas 75247

ROBERT M. BAPTISTE
25 Louisiana Avenue, N.W.
Washington, D.C. 20001

NORMAN B. SMITH
816 Southeastern Building
Greensboro, N.C. 27301

Attorneys for Petitioner International Brotherhood of Teamsters

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

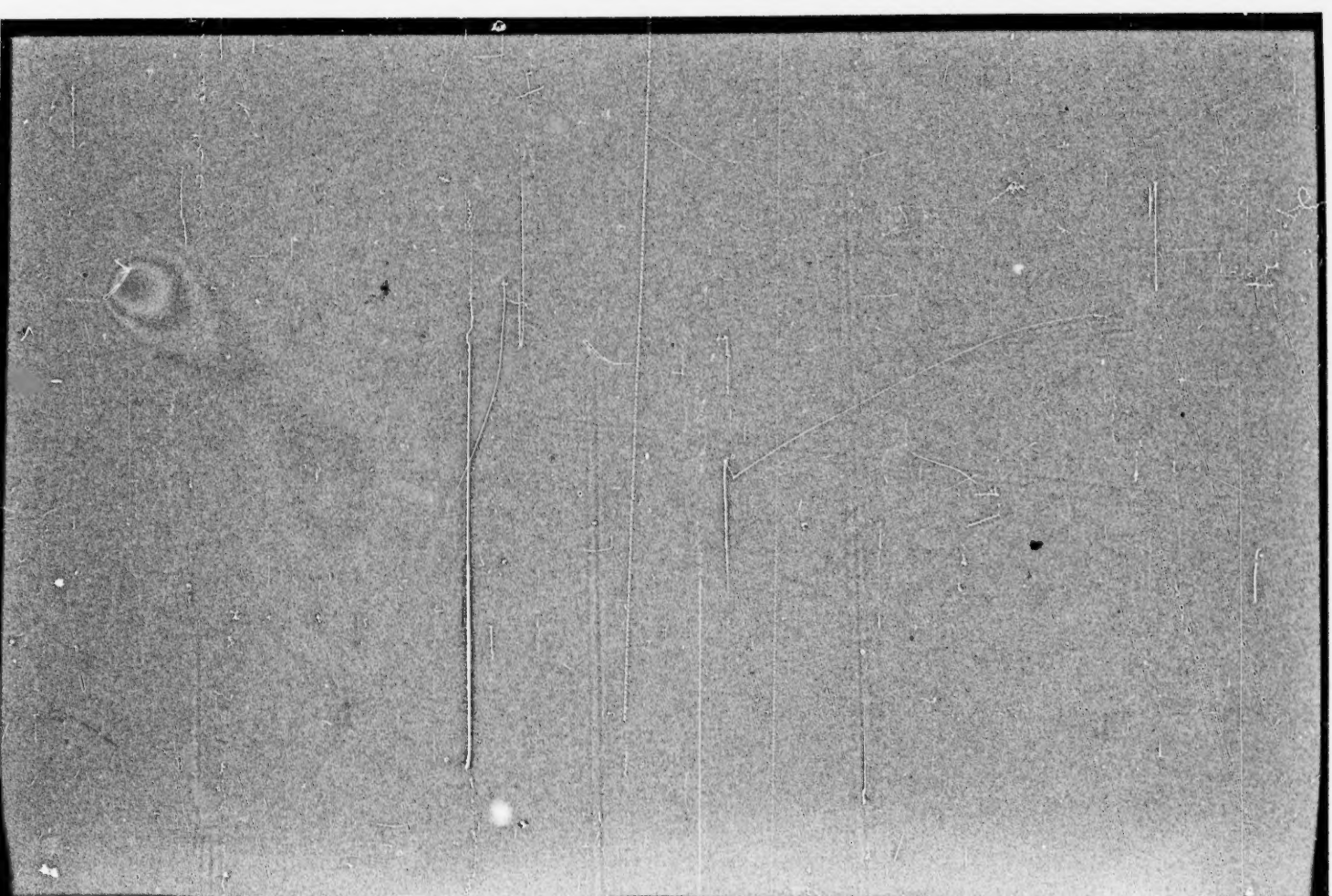


TABLE OF CONTENTS

	Page
Opinions Below	2
Jurisdiction	2
Question Presented	2
Statutes Involved	3
Statement of the Case	3
1. The Factual Background	3
2. Proceedings Below	6
A. Proceedings in the District Court	6
B. Proceedings in the Court of Appeals	9
C. Subsequent Proceedings	10
Reasons for Granting the Writ: The Court Below Has Construed *Boys Markets* v. *Retail Clerks*, 398 U.S. 235, Erroneously and in Conflict With Decisions of Other Courts of Appeals	11
Conclusion	16
Appendix A (Opinion of the District Court)	1a
Appendix B (Opinion of Craven, C.J., Granting a Stay)	20a
Appendix C (Opinion of the Court of Appeals)	25a
Appendix D (Judgment of the Court of Appeals)	30a
Appendix E (Statutes Involved)	31a

INDEX OF CITATIONS

CASES: Page

Amstar v. Amalgamated Meat Cutters & B. Workmen, 468 F.2d 1372 (C.A. 5) 8, 11, 12, 13, 14, 15, 16
Associated General Contractors of Illinois v. Illinois Conference of Teamsters, 454 F.2d 1324 (C.A. 7) . 15
Associated General Contractors of Minnesota v. Construction and General Laborers' Local 563, No. 3-74-Civ.-56 (D.Minn., March 29, 1974), appeals pending, C.A. 8, Nos. 74-1273, et al. 11
Barnard College v. Transport Workers, 372 F.Supp. 211 (S.D.N.Y.) 11
Boire v. Pilot Freight Carriers, Inc., 86 LRRM 2976 (M.D.Fla., June 28, 1974) 3
Boys Markets v. Retail Clerks, 398 U.S. 235..9, 11, 12, 13, 14
Gateway Coal Co. v. Mine Workers, 414 U.S. 368 15
General Cable v. International Brotherhood of Electrical Workers, Local Union 1644, 331 F.Supp. 478 (D.Md.) 11, 12
Liner v. Jafco, Inc., 375 U.S. 301 10
Martin Hageland, Inc. v. United States Dist. Ct. Cent. Dist. Cal., 460 F.2d 789 (C.A. 9) 15
Monongahela Power Co. v. Local 2332, International Brotherhood of Electrical Workers, AFL-CIO-CLC, 484 F.2d 1209 (C.A. 4) 7, 8, 9, 10, 11
Napa Pittsburgh v. Automotive Chauffeurs, 363 F. Supp. 54 (W.D.Pa.), appeal pending C.A. 3, No. 73-1798 11
Ourisman Chevrolet Co. v. Machinists, 77 LRRM 2084 (D.C.D.C.) 11
Parade Publications, Inc. v. Philadelphia Mailers U. No. 14, 459 F.2d 369 (C.A. 3) 11, 12, 13
Pilot Freight Carriers, Inc. v. Local 560, Int. Bro. of Team., 373 F.Supp. 19 (D.N.J.) 6, 11
Simplex Wire and Cable Co. v. Local 2208, International Brotherhood of Electrical Workers, 314 F. Supp. 885 (D.N.H.) 11, 12
Standard Food Products v. Brandenburg, 436 F.2d 964 (C.A. 2) 15
Super Tire Engineering Corp. v. McCorkle, 94 S.Ct. 1694 10

Page

STATUTES:

Judicial Code:

28 U.S.C. § 1254(1) 2

Labor Management Relations Act of 1947, 61 Stat. 136, 29 U.S.C. § 151, *et seq.*:

§ 301 .....3, 6, 12

Norris-LaGuardia Act, 47 Stat. 70, 29 U.S.C. § 101 *et seq.*:

§ 4 .....2, 3, 7, 12, 14, 15

RULE:

Federal Rules of Civil Procedure, Rule 41(b) 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No.

LOCAL 391, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, ET AL., *Petitioners*

v.

PILOT FREIGHT CARRIERS, INC., *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners Local 391, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, R. V. Durham, J. H. Church, and James William Lauck, pray that a writ of certiorari issue to review the

judgment of the Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the United States District Court for the Middle District of North Carolina is unreported. It is reprinted in App. A, pp. 1a-19a *infra*. The order of Circuit Judge Craven staying the order of the District Court pending appeal is unreported. It is reprinted in App. B, pp. 20a-24a *infra*. The opinion of the Court of Appeals for the Fourth Circuit is reported at 86 LRRM 2337. It is reprinted in App. C, pp. 25a-29a, *infra*.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on May 3, 1974. It is reprinted in App. D, p. 30a *infra*. This Court has jurisdiction under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Does a Court of the United States have jurisdiction, notwithstanding § 4 of the Norris-LaGuardia Act, 47 Stat. 70, 29 U.S.C., § 104, to restrain a union from engaging in activity specified and protected therein, where:

(a) the protected activity is in furtherance of a labor dispute which is not arbitrable under a collective bargaining agreement, and only the right to engage in such activity is claimed to be arbitrable by the party seeking the injunction; and

(b) the language in the collective bargaining agreement expressly excepts from the no-strike clause the right to engage in the form of protected activity which is sought to be enjoined?

STATUTES INVOLVED

This case involves § 4 of the Norris-LaGuardia Act, 47 Stat. 70, 29 U.S.C. § 104, and § 301(a) of the Labor Management Relations Act of 1947, 61 Stat. 156, 29 U.S.C. § 185(a). These provision are reprinted in App. E, p. 31a, *infra*.

STATEMENT OF THE CASE

1. The Factual Background.

Respondent Pilot Freight Carriers, Inc. (Pilot), is a common carrier of general commodity freight operating in and across various states under certificates of convenience and necessity issued by the Interstate Commerce Commission. (F. 1,[1] p. 1a, *infra*.); Petitioner Local 391 is a labor organization affiliated with petitioner International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (International). (F. 2-3, p. 2a, *infra*). Local 391 represents Pilot's employees in various bargaining units in North Carolina, and is signatory to current collective bargaining agreements with Pilot. (F. 6, p. 3a, *infra*.)

The present dispute arises out of a strike by the International's Jacksonville affiliate, Local 512, to enforce a demand for recognition by Pilot's Jacksonville employees. (F. 11, p. 5a, *infra*)[2] In support of that

---

[1] "F." refers to the Findings of Fact of the District Court in its order granting a preliminary injunction, App. A, *infra*.

[2] The National Labor Relations Board has issued a complaint alleging that by refusing to recognize and bargain with Local 512 and related conduct Pilot has violated §§ 8(a)(1), 8(a)(3), and 8(a)(5) of the Act, NLRB cases 12-CA-6267 and 12-CA-6288. See also *Boire* v. *Pilot Freight Carriers, Inc.*, 86 LRRM 2976 (M.D.Fla., June 28, 1974), granting in part and denying in part the Board's petition for preliminary relief under § 10(j) of the Act.

strike Local 512 established picket lines at Pilot's operations outside Florida. (Id.) On February 26, 1974, one such picket line was set up at the entrances of Pilot's terminal at Kernersville, North Carolina, with pickets carrying signs reading "PILOT FREIGHT CARRIERS, INC., JACKSONVILLE, FLORIDA UNFAIR. REFUSE TO BARGAIN FOR JACKSONVILLE, FLORIDA EMPLOYEES WITH TEAMSTER'S LOCAL UNION 512." (id.) A substantial majority of Pilot's employees represented by Local 391 have refused to cross the picket line (F. 11, pp. 5a-6a, *infra*).

On March 1, 1974, Local 391 issued a notice to its members ordering them not to become involved in the picket line but indicating that those employees who honored the picket line were relying upon Article 9 of the N.M.F.A. (quoted at pp. 5-6, *infra*) which reserves the right of employees not to cross a primary picket line. (F. 12, p. 6a, *infra*). Pursuant to Article 12, § 5(a) of the International Constitution, out-of-work benefits have been paid by International to about 1100 members of Local 391 because of their honoring the picket line involved in this case. Local 391 also directly supplements the payment made by International. The payments began, pursuant to the International constitution, two weeks after the picket line was established. (F. 5, pp. 2a-3a).

Most of Pilot's employees represented by Local 391 are covered by the National Master Freight Agreement (N.M.F.A.) as supplemented by the Over-the-Road and City Cartage Supplemental Agreements (Supplemental). Employees in other bargaining units are covered by the Carolina Automotive Maintenance Agreement (Maintenance) and the Kernersville Ter-

minal and Maintenance Office Agreement (Office). Directly involved are Articles 8 and 9 of the N.M.F.A. and Article 44 of the Supplement to N.M.F.A.[3]

Article 8 of the N.M.F.A. provides for the processing of all grievances or questions of interpretations arising under the N.M.F.A. or supplements. It specifically provides for mandatory use of the grievance machinery in Section 1(a) for "All factual grievances or questions of interpretation arising under the provisions of the Supplemental Agreement, (or factual grievances arising under the National Master Agreement) . . ." and in Section 1(b) that "Any matter which has been referred pursuant to Section 1(a) above, or any question concerning the interpretation of the provisions contained in the Master Agreement, shall be submitted to a permanent National Grievance Committee . . . ." Further, Article 8, Section 2(b) provides:

> The question of whether the International Union . . . or the Local Union, separately or jointly, participated in an unauthorized work stoppage slowdown, walkout or cessation of work in violation of this Agreement by calling, encouraging, assisting ing or aiding in such stoppage, etc., in violation of this Agreement shall be submitted to the grievance procedure at the national level, prior to the institution of any damage suit action.

Article 9 (N.M.F.A.) provides:

> (1) It shall not be a violation of this Agreement, and it shall not be cause for discharge or disciplinary action in the event an employee refuses to enter upon any property involved in a primary labor

[3] The corresponding provisions in the Maintenance and Office Agreements are "similar" (F. 10, p. 5a, *infra*), and we shall therefore refer throughout only to the N.M.F.A. and Supplemental Agreements.

dispute, or refuses to go through or work behind any primary picket line, including the primary picket line of Unions party to this Agreement, and including primary picket lines at the Employer's places of business.

Article 44 (Supplemental) provides:

. . . that there shall be no strikes, lock-outs, tie-ups, or legal proceedings, without first using all possible means of a settlement as provided for in this Agreement . . . (F. 7-9, pp. 4a-5a *infra*)

2. PROCEEDINGS BELOW

A. Proceedings in the District Court

Pilot brought this action against the International, Local 391 and some of Local 391's officers, employees, and members under § 301 LMRA.[4]

The Amended Complaint alleged that contracts between it and the defendants[5] expressly provide that 'there shall be no strikes, lockouts, tieups, or legal proceedings without first using all possible means of settlement as provided for in this Agreement of any controversy which might arise' " (¶ 6).

---

[4] Pilot brought related suits for injunctions in five states. See *Pilot Freight Carriers, Inc.* v. *Local 560, Int. Bro. of Team.*, 373 F.Supp. 19, 27, n. 3 (D.N.J.). In the latter case Judge Stern, in a thorough and reasoned opinion, denied injunctive relief, and pursuant to F.R.Civ.P. 41(b), dismissed Pilot's complaint. The federal court in Georgia dissolved a preliminary injunction after the National Grievance Committee had determined that Pilot had violated Article 9 of the N.M.F.A. by seeking that injunction. (See F. 14, pp. 6a-7a, *infra*.) In Massachusetts Pilot was denied all relief; in New York and Virginia *ex parte* temporary restraining orders issued by state courts were dissolved on removal by federal courts.

[5] In the courts below the International urged that it is not a party to the agreements with Pilot; we do not pursue that issue in this Petition.

Pilot further alleged the establishment of the picket line at the entrance of Pilot's Kernersville Terminal, that "a strike occurred which brought normal operations at [Pilot's] terminal to a halt" (¶ 9), and that it is willing to arbitrate and has filed grievances to determine whether the unions have a contractual obligation not to honor the picket line.[6] Pilot prayed for injunctive relief as well as $10,000,000 damages.

After a hearing, the District Court entered a "Preliminary Injunction", App. A, *infra*. The Court made findings of fact, summarized above. On the merits the Court ruled that it was empowered to grant an injunction notwithstanding § 4 of the Norris-LaGuardia Act.

The Court reasoned that it is an arbitrable matter whether the refusal to cross the picket line was in violation of the agreement, and that this conduct could therefore be enjoined pending arbitration (see pp. 9a-14a, *infra*). In so ruling the Court followed the prior Fourth Circuit decision in *Monongahela Power Co.* v. *Local 2332, International Brotherhood of Electrical Workers, AFL-CIO-CLC*, 484 F.2d 1209 (hereafter "*Monongahela*").

---

[6] The latter allegation was contained in ¶ 10 of the Complaint, which, because it is the focus of the legal issue here, we quote in full:

> "The defendants, nor any of them, have [sic] filed any grievance according to the existing contract, if indeed any of them have grievances, but have exerted coercive action in deliberate, willful and calculated violation of existing collective bargaining agreements. Plaintiff is willing to arbitrate the dispute created by the defendant labor organizations, and has filed grievances for the purpose of determining whether the employees covered by the aforesaid agreements have contractually bound themselves not to honor such a picket line and thereby engage in a work stoppage."

In that case members of the defendant union refused to cross a picket line established by another local of the IBEW in a show of "sympathy and solidarity". The contract between the parties had a broad provision requiring the arbitration of all disputes arising thereunder. The contract also unqualifiedly prohibited strikes, work stoppages, etc. during its term (*id.* at 1210-1211). The Fourth Circuit held that the right of the employees to honor the sister local's picket line was an arbitrable matter and pending such arbitration enjoined that work stoppage (*id.* at 1211-1215).

The District Court here recognized that the contrary view had been taken in *Amstar* v. *Amalgamated Meat Cutters & B. Workmen,* 468 F.2d 1372 (C.A. 5) but properly stated that it was "bound by the precedent of its own Fourth Circuit decisions, as opposed to that of the Fifth Circuit." (p. 8, *infra*). The Court also ruled that *Monongahela* was not distinguishable by virtue of Article 9 of the N.M.F.A. (pp. 9a-11a, *infra*).

The District Court entered a sweeping injunction. In part, the Court: 1) directed defendants, "pending trial of this cause on its merits, or a valid and proper exhaustion of contractual remedies, to end the work stoppage now in effect by forthwith notifying the members of Local 391 * * * that any member who relies upon his alleged contractual rights to refuse to cross such picket line would be acting in violation of this injunction"; 2) directed defendants to "take immediate affirmative action to end the work stoppage and encourage the members of Local 391 not to rely upon their alleged contractual rights in deciding not to cross Local 512's picket line"; and 3) restrained defendants "from taking any action either verbal or financial which would aid, assist, encourage,

or any way support the decision of any member of Local 391 to honor Local 512's picket line at plaintiff's places of business" (¶¶ 1-3, pp. 18a-19a, *infra*). The injunction was conditioned on Pilot's posting of a $150,000 bond and further upon plaintiff's proceeding promptly to "submit for grievance the issues raised before this Court which concern Articles 8 and 9 of the N.M.F.A. and Article 44 of the Supplemental agreements, and the corresponding provisions in the Maintenance and Office agreements." (¶¶ 5, 7, p. 19a, *infra*)

B. Proceedings in the Court of Appeals

The defendants promptly noticed an appeal and sought a stay of the injunction in the Court of Appeals. That stay was granted by Circuit Judge Craven, the author of the *Monongahela* opinion, who observed that that case "presently represents the outer limit of the *Boys Markets* injunction". In Judge Craven's view the presence of Article 9 of the N.M.F.A., which "expressly recognizes the right of any employee to honor a primary picket line", would probably be sufficient to distinguish *Monongahela*, so that the unions would probably prevail on the appeal. (Pp. 20a-22a, *infra*).

In the event, Judge Craven's prediction proved to be mistaken. On May 3, 1974, the panel of the Fourth Circuit which heard the appeal ruled that the

> "relationship between the no-strike clause and the clause allowing individual employees to refuse crossing a primary picket line was, we think, an arbitrable matter, as is Pilot's contention that the underlying dispute, whether the local union or national union had directed or influenced concerted activity not to cross the picket line, as opposed to individual employees' decisions not to cross it." (p. 29a, *infra*)

And, adhering to *Monongahela,* the Court held that the District Court had properly enjoined the work stoppage pending arbitration of that issue. The Court reinstated the District Court's judgment against the union defendants.[7]

C. Subsequent Proceedings

Thereafter, the arbitration proceedings under the three separate contracts which had been directed by the District Court concluded. The National Grievance Committee determined that the work stoppage was not in violation of the N.M.F.A. and Supplemental agreement. The Carolina Bi-State Grievance Committee also ruled in the union's favor under the Office contract and deadlocked in the decision covering the maintenance workers. This terminated the grievance proceedings. The defendants therefore moved to dissolve the preliminary injunction. After some delay, which necessitated further intervention by the Court of Appeals, the District Court on May 30, 1974, dissolved the injunction. It ruled, *inter alia,* that the International was now permitted to pay out-of-work benefits except for the period May 3, 1974 (when the injunction was entered) to May 21, 1974.[8]

---

[7] The Court ruled, however, that the District Court had erred in issuing an injunction which required the individual members of Local 391 to cross the picket line and modified the injunction accordingly. See pp. 26a, 29a, *infra.*

[8] The right of the International to pay and the members to receive those benefits pursuant to the International constitution (see p. 4, *supra*) is therefore directly at issue in this proceeding. The controversy is very much alive for three additional reasons: 1) plaintiff had posted a substantial injunction bond (see *Liner* v. *Jafco,* 375 U.S. 301, 305-306); 2) the problem is a recurring one which because of the relatively short duration of strike injunctions is likely to escape review if termination of the injunction were to moot the case (see *id.* at 306-308 and *Super Tire Engineering Corp.* v. *McCorkle,* 94 S.Ct. 1694); and 3) Pilot has noted an appeal from the dissolution of the injunction.

REASONS FOR GRANTING THE WRIT

THE COURT BELOW HAS CONSTRUED BOYS MARKETS v. RETAIL CLERKS, 398 U.S. 235, ERRONEOUSLY AND IN CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEALS.

The decision of the Fourth Circuit in this case is in direct conflict with decisions of the Third and Fifth Circuits. For the court below reaffirmed its view that conduct protected by § 4 of Norris-La Guardia can be enjoined, although the underlying labor dispute is non-arbitrable, and the only grievance is whether such conduct itself is in breach of contract. See also *Monongahela*, p. 8, *supra*. And the precise employer contention accepted by the Fourth Circuit has been squarely rejected by the Third Circuit in *Parade Publications, Inc.* v. *Philadelphia Mailers U. No. 14*, 459 F.2d 369 (hereafter "*Parade*"), and by the Fifth Circuit in *Amstar* v. *Amalgamated Meat Cutters & B. Workmen*, 468 F.2d 1372 (hereafter "*Amstar*"), as an impermissible extension of this Court's limited accommodation of the strong anti-injunction policies of the Norris-LaGuardia Act "to the Congressional policy favoring the voluntary establishment of a mechanism for the peaceful resolution of labor disputes", *Boys Markets* v. *Clerks Union*, 398 U.S. 235, 253.[9]

---

[9] The District Courts are likewise sharply divided. See, *e.g.*, Denying an injunction: *Pilot Freight Carriers, Inc.* v. *Local 560, Int. Bro. of Teams.*, 373 F.Supp. 19 (D.N.J.); *General Cable v. International Brotherhood of Electrical Workers, Local Union 1644*, 331 F.Supp. 478 (D.Md.); *Simplex Wire and Cable Co.* v. *Local 2208 of the International Brotherhood of Electrical Workers*, 314 F.Supp. 885 (D.N.H.); *Ourisman Chevrolet Co.* v. *Machinists*, 77 LRRM 2084 (D.C.D.C.); Granting an injunction: *Associated General Contractors of Minnesota* v. *Construction and General Laborers' Local 563*, No. 3-74-Civ.-56 (D.Minn., March 29, 1974), appeals pending C.A.8, Nos. 74-1273, et al.; *Barnard College* v. *Transport Workers*, 372 F.Supp. 211 (S.D.N.Y.); *NAPA Pittsburg* v. *Automotive Chauffeurs*, 363 F.Supp. 54 (W.D.Pa.), appeal pending C.A. 3, No. 73-1798.

As *Amstar* (see 468 F.2d at 1372) and the cases cited at p. 11, n. 9, *supra,* illustrate, the situation out of which this case arose is familiar in industrial relations: a strike against an employer by employees not covered by a current no-strike obligation and a picket line addressed to other employees of that employer who are covered by a current collective bargaining agreement. And the opinion in *Amstar* persuasively demonstrates that the view there taken, and not that of the court below is in harmony with *Boys Markets:*

> "In attempting to accommodate [t]he literal terms of § 4 of the Norris-LaGuardia Act . . . to the subsequently enacted provisions of § 301(a) of the Labor Management Relations Act and the purposes of arbitration,' the Supreme Court in *Boys Markets* established three prerequisites to jurisdiction in a federal district court to enjoin a strike: (1) the strike must be in breach of a no-strike obligation under an effective collective agreement, (2) the strike must be 'over' an arbitrable grievance, and (3) both parties must be contractually bound to arbitrate the underlying grievance which caused the strike.
>
> The case *sub judice* is entirely outside the scope of the exception to the Norris-LaGuardia Act delineated in *Boys Markets. See* Parade Publications, Inc. v. Philadelphia Mailers Union, Local 14, 3 Cir. 1972, 459 F.2d 369; General Cable Corp. v. IBEW, Local 1614, D.Md. 1971, 331 F.Supp. 478; Simplex Wire and Cable Co. v. IBEW, Local 2208, D.N.H. 1970, 314 F.Supp. 885. The strike by the Chalmette employees was not over a grievance which the parties were contractually bound to arbitrate. Rather, the strike itself precipitated the dispute—the validity under the Union's no-strike obligation of the member-employees honoring the ILA picket line. Were we to hold that the legality of the very strike sought to

> be enjoined in the present situation constituted a sufficiently arbitrable underlying dispute for a *Boys Market* injunction to issue, it is difficult to conceive of any strike which could not be so enjoined. 468 F.2d at 1373, footnote omitted.

The latter point merits special attention, for the *Amstar* Court there recognized that if an injunction is authorized where the validity of the strike action is the sole issue to be arbitrated, the avowedly "narrow" exception of *Boys Markets* would be transmuted into a general repeal of Norris-LaGuardia during the life of a collective bargaining agreement. This insight is confirmed by the employer's tactic in *Parade, supra.* There the union struck during the life of an agreement (which contained broad arbitration and no-strike clauses) over whether the agreement applied at another plant. Parade sought to enjoin the strike, but not to arbitrate the underlying dispute—indeed, it apparently wished to avoid arbitration of the coverage issue. Instead, Parade asserted "that the strike itself clearly created an arbitrable issue of whether the union had violated the general 'no-strike' clause" (459 F.2d at 374). Compare ¶ 10 of Pilot's complaint, quoted at p. 6, n. 6, *supra.* The Third Circuit rejected this contention "for two reasons" (*id.*), of which one is directly in point here:

> "Second, this argument of Parade goes beyond anything decided in the *Boys Market* case. Indeed, if the Diversified situation caused the strike and does not present an issue which the parties have bound themselves to arbitrate, it would run contrary to the rationale of *Boys Market* to grant Parade an injunction. We read the opinion in that case to indicate that arbitration should be encouraged by permitting judicial enforcement of a 'no strike' clause when the underlying issue is arbitrable, but that there should be no injunction if the underlying dispute is not arbitrable." (*id.*)

In short, both the Fifth and Third Circuits have squarely held that *Boys Markets* does not authorize an injunction "when the legality of the strike sought to be enjoined is the alleged arbitrable dispute", because such an injunction "is permissible only if the underlying dispute 'over' which the strike has been called is arbitrable" (*Amstar*, 468 F.2d at 1372-1373). Yet, in the Fourth Circuit, a work stoppage is subject to injunction without a finding that it is "over" an arbitrable dispute, and the only arbitrable issue is the legality of the stoppage.

We emphasize that the Fourth Circuit's rule is not, as the *Boys Markets* holding was deemed to be, essential to preserve "the effectiveness of the arbitration technique as a method peacefully to resolve industrial disputes without resort to strikes, lockouts, and similar devices" (398 U.S. at 252). On the contrary, arbitration has flourished although—perhaps in part, because—it has not been customary for the party which invokes arbitration over an alleged breach of contract to seek an injunction against the breach pending arbitration. If this did become the practice, the courts would continually be brought into labor disputes prior to arbitration and labor grievances, increasing the cost to the parties and further burdening judicial dockets.[10]

---

[10] Since employee refusals to cross a picket line are expressly within § 4 of the Norris-LaGuardia Act, affirmance of the decision below would, *a fortiori*, authorize an injunction in favor of a *union* which claims that an *employer* is breaching a contract, and validly asserts the right to arbitrate that claim. To be sure, in some instances, the availability of back pay would justify denial of the injunction on a balancing of the equities. But these will frequently favor the union, as for example, where the breach sought to be enjoined prior to arbitration is a plant closing or a change in working conditions which creates an increased safety or health hazard.

As a condition for the injunction Pilot was directed to arbitrate the question whether the union's activities are in breach of the contract. See p. 9, *supra*. This portion of the District Court's order was in compliance with that portion of the *Boys Markets* opinion which states that "the employer should be ordered to arbitrate, as a condition of his obtaining an injunction against the strike" (398 U.S. at 254). But it also highlights the incongruity of the Fourth Circuit's position and its fundamental inconsistency with *Boys Markets*. For in directing the arbitration, the Court did not, of course, itself determine that the enjoined activity was in breach of the agreement. Yet *Boys Markets* also holds that before granting an injunction *the Court must* determine that "breaches are occurring and will continue, or have been threatened and will be committed" (398 U.S. at 254). See also, *Gateway Coal Co.* v. *Mine Workers*, 414 U.S. 368, 380-387. This protection is of particular importance to a union whose contractual no-strike obligation is not absolute, because some issues are expressly excepted therefrom[11] or, because, as here, the union has expressly reserved the employees' right to engage in some forms of work stoppage. Cf. *Gateway, supra*, id. at 382. For in those situations the risk is maximized that conduct protected by § 4 of the Norris-LaGuardia Act will be enjoined although it is entirely consistent with the union's contractual promise. The National Grievance Committee's award favoring these petitioners (p. 10, *supra*) establishes that the Fourth Circuit's rule has this drastic consequence not only in theory but in reality.

---

[11] See, *Martin Hageland, Inc.* v. *United States Dist. Ct. Cent. Dist., Cal.*, 460 F.2d 789 (C.A.9); *Associated General Contractors of Illinois Conference of Teamsters*, 454 F.2d 1324 (C.A.7); *Standard Food Products* v. *Brandenburg*, 436 F.2d 964 (C.A.2).

In short, the holding below *does* "undermine the vitality of the Norris-La Guardia Act", contrary to *Boys Markets,* 398 U.S. at 253.

CONCLUSION

For the foregoing reasons this Petition for Certiorari should be granted.

Respectfully submitted,

HUGH J. BEINS
3812 Kanawha St., N.W.
Washington, D.C. 20015

RENN DRUM
206 Pepper Building
Winston-Salem, N. C. 27101

Attorneys for Petitioner Local 391 and Individual Petitioners

GEORGE KAUFMANN
1735 New York Ave., N.W.
Washington, D.C. 20006

Of Counsel

DAVID PREVIANT
GERRY MILLER
211 West Wisconsin Ave.
Milwaukee, Wisc. 53203

L. N. D. WELLS, JR.
8204 Elmbrook Drive
Dallas, Texas 75247

ROBERT M. BAPTISTE
25 Louisiana Ave., N.W.
Washington, D.C. 20001

NORMAN B. SMITH
816 Southeastern Building
Greensboro, N. C. 27301

Attorneys for Petitioner International Brotherhood of Teamsters

APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
WINSTON-SALEM DIVISION

PILOT FREIGHT CARRIERS, INC., *Plaintiff*

v.

LOCAL 391, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA (hereafter called "391 IBT"); R. V. DURHAM; J. H. CHURCH; T. W. BOGER; D. F. BEASLEY; BOBBY J. VESTAL; JOHN P. HANES; JAMES WILLIAM LAUCK; and INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA (hereafter called "International"), *Defendants*

C-74-69-WS

PRELIMINARY INJUNCTION

This cause comes before the Court on plaintiff's complaint alleging breach of contract and asking for damages and injunctive relief. The particular matter now before the Court concerns plaintiff's request for a preliminary injunction. After considering the pleadings, evidence, and arguments of counsel, the Court enters the following findings of fact, discussion, and conclusions of law.

I.

FINDINGS OF FACT

1. The plaintiff, Pilot Freight Carriers, Inc. (Pilot), is a common carrier of general commodity freight operating across various states under certificates of convenience and necessity issued by the Interstate Commerce Commission and is an employer within the meaning of Section 2(2) of the National Labor Relations Act (N.L.R.A.), 29 U.S.C. § 152(2), and, by its transportation of freight along the east coast of the United States and receiving annual rev-

enues in excess of one million dollars, it is an industry "affecting commerce" within the meaning of Section 2(7) of the N.L.R.A., 29 U.S.C. § 152(7). It is a North Carolina corporation with a principal place of business in Forsyth County of that state.

2. Local 391 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Local 391) is an organization engaged in the representation of the employees of Pilot with its principal office located in Guilford County in the Middle District of North Carolina. Local 391 is a "labor organization" within the meaning of Section 2(5) of the N.L.R.A., 29 U.S.C. § 152(5).

3. Defendant International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (International) is a "labor organization" engaged in the representation of employees within the meaning of Section 2(5) of the N.L.R.A., 29 U.S.C. § 152(5). Local 391 is an affiliate of International.

4. Defendants Durham and Church are officers of Local 391, and defendant Lauck is an organizer employed by Local 391. Defendants Boger, Beasley, Vestal, and Hanes are members of Local 391 and employees of Pilot.

5. The constitution of International regulates in detail the actions of its local unions. In the area of control, the present constitution does not vary significantly from the ones examined in *International Bro. of Teamsters, Etc.* v. *United States*, 275 F.2d 610 (4th Cir. 1960), and *Great C. Ex., Inc.* v. *International Broth. of Team.*, 350 F.Supp. 1377 (E.D. Va. 1972). Moreover, the present constitution has a provision whereby the General Executive Board can pay out-of-work benefits where it recognizes the strike as a proper one for the payment of benefits. Article XII, Section 5(a) of the constitution continues:

> Benefits shall be paid to all other member employees of the primary employer at all terminals . . . if such

> member employees shall have become unemployed as a direct result of a strike involving other Teamster member employees which strike has been approved pursuant to Section 3, . . .

The General President and General Executive Board may terminate benefits "when satisfied upon facts and information in their possession that the support of a strike or lockout should cease." Out-of-work benefits have been paid by International to about 1100 members of Local 391 because of their honoring the picket line involved in this case. Local 391 also directly supplements the payments made by International. The payments began, pursuant to the provisions of the constitution, two weeks after the picket line was established.

6. Local 391 represents employees of the plaintiff in various bargaining units in North Carolina. Pilot and Local 391 have been parties to labor contracts regulating wages, hours, and terms and conditions of employment of the employees represented by Local 391. Each of said contracts contains a grievance procedure established for the purpose of resolving all disputes between the parties involving the application and interpretation of such agreement. In every case, majority decisions by the grievance committees established by the contracts are final and binding on all parties.

Pilot and Local 391, with the approval of International, are parties to a contract entitled "National Master Freight Agreement" (N.M.F.A.). In addition, Pilot and Local 391 have contracts which supplement the N.M.F.A. These are the Over-the-Road and City Cartage Supplemental Agreements (Supplemental). They are also parties to contracts covering other employees not covered by the N.M.F.A. These contracts are the Carolina Automotive Maintenance Agreement (Maintenance) and the Kernersville Terminal and Maintenance Office Agreement (Office).

7. Article 7 of the N.M.F.A. provides that the grievance machinery "may be invoked only by the authorized Union representative or the Employer."

Article 8 of the N.M.F.A. provides for the processing of all grievances or questions of interpretations arising under the N.M.F.A. or supplements. It specifically provides for mandatory use of the grievance machinery in Section 1(a) for "All factual grievances or questions of interpretation arising under the provisions of the Supplemental Agreement, (or factual grievances arising under the National Master Agreement) . . ." and in Section 1(b) for "Any matter which has been referred pursuant to Section 1(a) above, or any question concerning the interpretation of the provisions contained in the Master Agreement, shall be submitted to a permanent National Grievance Committee . . . ."

Section 2 of Article 8 of the N.M.F.A. provides for determining whether a work stoppage, slowdown, walkout, or cessation of work in violation of the contract is or is not authorized, and if unauthorized, the means for terminating such. Subsection (b) of Section 2 provides for submission to the grievance machinery at the national level the question of whether the International or the local union has met its obligations in stopping an unauthorized work stoppage, and second, whether the International or local union "separately or jointly, participated in an unauthorized work stoppage, slowdown, walkout, or cessation of work *in violation of the Agreement* by calling, encouraging, assisting, or aiding in such stoppage, etc., in violation of this Agreement, . . ." The other provisions of Section 2 further detail the working of the grievance machinery, and when its decisions are binding on the parties.

8. Article 9 of the N.M.F.A. provides:

> (1) It shall not be a violation of this Agreement, and it shall not be cause for discharge or disciplinary action in the event an employee refuses to enter upon

any property involved in a primary labor dispute, or refuses to go through or work behind any primary picket line, including the primary picket line of Unions party to this Agreement, and including primary picket lines at the Employer's places of business.

. . . .

(5) Within five (5) working days of filing of grievance claiming violation of this Article, the grievance shall be submitted directly to the National Grievance Committee without taking any intermediate steps, any other provisions of this Agreement to the contrary notwithstanding.

9. Article 44 of the Supplemental agreement declares:

The Unions and the Employers agree that there shall be no strikes, lock-outs, tie-ups, or legal proceedings, without first using all possible means of a settlement as provided for in this Agreement, of any controversy which might arise. Disputes shall first be taken up between the Employer and the Local Union involved. Failing adjustment by these parties, the following procedure shall then apply:

10. The Carolina Automotive Maintenance Agreement and the Kernersville Terminal and Maintenance Office Agreement both contain provisions similar to Article 44 of the Supplemental agreement and to Article 9, Section 1, of the N.M.F.A. Both contracts provide for mandatory and binding grievance procedures as in Article 44.

11. On February 26, 1974, a picket line was set up at the entrances of Pilot's terminal at Kernersville, North Carolina, with pickets carrying signs reading "PILOT FREIGHT CARRIERS, INC., JACKSONVILLE, FLORIDA UNFAIR. REFUSE TO BARGAIN FOR JACKSONVILLE, FLORIDA EMPLOYEES WITH TEAMSTER'S LOCAL UNION 512." Local 512 has been attempting to gain recognition by Pilot at its operation in Florida. It has set up its picket lines at Pilot's operations in other states. As a result of the picket line the following number of employees have not honored the picket line at the Ker-

nersville terminal: 150 out of 700 over-the-road drivers; 3 out of 225 dock workers; 6 out of 40-50 local drivers; 10-12 out of 150 maintenance employees; and 15-20 out of 75 office employees. Pilot's operations have been severely curtailed.

12. On March 1, 1974, Local 391 put out a notice to its members ordering them not to become involved in the picket line but indicating that those employees who honored the picket line were relying upon Article 9 of the N.M.F.A. which gave the members the right not to cross a primary picket line.

13. On March 1, 1974, Pilot filed grievances requesting an interpretation of whether a concerted work stoppage is in violation of Article 44 of the Supplemental agreement, and of Article 8 of the Maintenance agreement, and of Article X of the Office agreement. On March 22, 1974, Pilot attempted to invoke Section 2(a) of Article 8 in order to determine whether the strikes at its terminals were authorized. The Area Directors for the Southern and Eastern Conference of Teamsters refused to act on the request stating that it was not timely.

14. One of the stipulations of the parties is as follows:

> h. The National Grievance Committee established under the National Master Freight Agreement heard a case involving Pilot and Local 728, Atlanta, Georgia, in Chicago, Illinois, on March 22, 1974. A copy of the transcript of that hearing is attached as defendant 391 IBT's Exhibit V.

The Committee concluded:

> [O]n the basis of the facts presented and on the basis of Pilot Freight Carrier, Inc.'s injunctive proceedings [in federal court in Georgia] presented to the committee, which applies against individual employees covered by the National Master Freight Agreement who were respecting the picket lines established at

Atlanta, Georgia and Dalton, Georgia, Pilot Freight Carrier, Inc. is in violation of the provisions of Article 9.

The Committee did not concern itself with Article 44 of the Supplemental agreement which is involved in this case. It had no jurisdiction over the Maintenance or Office agreements involved here.

15. Pilot's revenue has decreased approximately one half since its employees have honored Local 512's picket line. It is losing about $150,000 a day in revenue.

16. The Court takes notice from its earlier abortive hearing on this matter which was held on March 21, 1974, that Pilot has attempted to resolve its labor problems in good faith.[1]

---

[1] This case was removed from state court to this court and defendant Local 391 filed a motion to dissolve the state court's TRO. Plaintiff asked for preliminary injunction and preferential consideration. Upon returning from court in another division of this district in mid-afternoon on Friday, March 8, 1974, the Court conferred with counsel for the parties. Thereafter, negotiations between counsel were conducted until Saturday afternoon, March 9, when the Court heard the parties, in chambers, on defendants' motion to dissolve the state court's TRO. The Court elected to allow the state court's TRO to expire by its own terms on Sunday, March 10. The parties negotiated in good faith the following week but on Monday, March 18, advised the Court that negotiations had terminated, that an amended complaint had been filed making International a party, and that local counsel agreed to waive formal notice and have the preliminary injunction hearing on Thursday, March 21. Counsel for International appeared at the hearing, protested lack of formal notice and advised the Court that International was not in a position to proceed at that time. Rather than to hear the matter twice, the Court instructed the plaintiff to consult with the Clerk of this Court, have the matter scheduled for hearing at an appropriate time and to give adverse parties formal notice. This hearing was held on April 3, 1974.

II.

Discussion

The specific issue before the Court is whether it has authority to issue an injunction in order to enforce the mandatory grievance procedures of the parties' contract. The defendants contend that Section 4 of the Norris-LaGuardia Act, 29 U.S.C. § 104 prohibits the issuance of an injunction. They claim that Local 391 has no dispute with the plaintiff company and that its members are merely exercising their right under Article 9 of the N.M.F.A. to refrain from crossing the picket line set up by members of Local 512. Thus they say that since there is no dispute, there is nothing to arbitrate and thus there exists no ground for issuance of a *Boys Markets* injunction. (*Boys Markets* v. *Retail Clerks Union*, 398 U.S. 235, 90 S.Ct. 1583, 26 L.Ed.2d 199 (1970)). In support of that position defendants cite *Amstar Corp.* v. *Amalgamated Meat Cutters & B. Workmen*, 468 F.2d 1372 (5th Cir. 1972), and *Pilot Freight Carriers, Inc.* v. *Local 560, Int. Bro. of Team.*, No. 74-339 (D.N.J. 1974).

Plaintiff, on the other hand, relies upon *Monongahela Pow. Co.* v. *Loc. No. 2332 Int. Bro. of El. Wkrs.*, 484 F.2d 1209 (4th Cir. 1973). (This Court is, of course, bound by the precedent of its own Fourth Circuit decisions, as opposed to that of the Fifth Circuit.) In that case, the workers of a local at one of the company's plant divisions refused to cross a picket line set up by members of a different local who worked at another of the company's divisions. The company brought an action in district court seeking damages and injunctive relief on the grounds that the refusal to cross the picket line constituted a work stoppage which was forbidden by the parties' contract and was in violation of said contract. The contract contained a provision for mandatory arbitration of disputes concerning "the interpretation, application, or claimed violation of any express provision of the Agreement." As in the instant case,

the defendant union claimed that the refusal to cross the picket line was an individual decision not promoted by the union and was protected by Section 7 of the National Labor Relations Act, 29 U.S.C. § 157, and thus was outside the reach of the *Boys Markets* decision. The court concluded that the matter was subject to arbitration, saying: "[w]hile there exists a statutory right of employees to refuse to cross a picket line of another union, 29 U.S.C. § 158(b), this right may be waived, and was waived here, by the action of their union in agreeing to a no-strike clause." (484 F.2d at 1214).

The defendant union contends that the particular factual situation of this case does not fall within that of the *Monongahela* decision since it has Article 9 in its agreement which specifically permits its members to honor a primary picket line. That statement, however, begs the real question before the Court which is whether the parties have agreed to submit the controversy to a mandatory contractual grievance procedure. The decision in *Boys Markets* set out guidelines for district courts to follow in deciding whether injunctive relief is appropriate. The court in *Monongahela* reiterated those as follows:

> (1) the collective bargaining agreement must contain a mandatory adjustment or arbitration procedure; (2) the court must first determine that the strike is over a grievance which both parties are contractually bound to arbitrate; (3) the court must order the employer to arbitrate as a condition of his obtaining an injunction against the strike." fn.14, 484 F.2d at 1214.

The Court concludes that those three criteria exist in this case. Here there is a mandatory grievance adjustment procedure. Article 8 of the N.M.F.A. provides for the submission of all factual grievances and questions of interpretation to the grievance procedure. Article 7 of the N.M.F.A. provides that the grievance machinery may be invoked by both the employer and an authorized union representative.

The N.M.F.A. specifically covers work stoppages and cessation of work in violation of the agreement. Section 2(a) of Article 8 provides for a determination of whether a work stoppage is authorized by the union, and for taking corrective action if it is unauthorized. Section 2(b) explicitly provides for use of the grievance machinery at the national level in case the work stoppage is unauthorized in violation of the agreement.

Moreover, Article 44 of the Supplemental agreements between Local 391 and Pilot prohibits strikes and tie-ups without first resorting to use of the grievance machinery. The Maintenance and Office agreements have similar provisions.

Having found that the parties have a mandatory grievance procedure, the Court must next decide whether there is a dispute or controversy which the parties are bound to arbitrate. The defendants contend that Article 9 of the N.M.F.A. clearly gives their members the right to refuse to cross a primary picket line. They claim that this alleged right is not an arbitrable matter and that the determination of whether Local 512's picket line is a primary or secondary one lies within the exclusive competence of the National Labor Relations Board (Board). The Court concludes otherwise.

The duty of this Court in an action brought pursuant to 29 U.S.C. § 185 in determining the issue of arbitrability is limited to whether the claim of the party seeking arbitration is one which on its face is governed by the contract. *Winston-Salem Printing Press & A.U.* v. *Piedmont Pub. Co.*, 393 F.2d 221 (4th Cir. 1968). It is not within the province of this Court to determine the merits of the controversy, that being a matter for the grievance committee.[2] *Tobacco*

[2] Thus the Court specifically refrains from deciding whether the Local 512's picket line involves a primary or secondary dispute. The Court does note, however, that there is room for argument on

Wkrs. Int. U., Local 317 v. *Lorillard Corporation*, 448 F.2d 949 (4th Cir. 1971); *Local No. 6, B.M.&P. Int. U. of Am.* v. *Boyd G. Heminger, Inc.*, 483 F.2d 129 (6th Cir. 1973); *H. K. Porter Co., Conners Div. W.Va. W.* v. *Local 37, United Steel*, 400 F.2d 691 (4th Cir. 1968).

In the instant case, Article 8 of the N.M.F.A., Article 44 of the Supplemental agreements, and the Maintenance and Office agreements all provide for mandatory use of the grievance machinery either in the case of work stoppages and cessation of work in violation of the contract, or in the case of strikes and tie-ups. The decision of the grievance committee may be binding on the parties. It is abundantly clear from the contract that the parties intended to give up the right to strike or to stop work until they had resorted to their grievance procedure. In fact, the Supreme Court has recently stated in *Gateway Coal Co.* v. *Mine Workers*, — U.S. —, 94 S.Ct. —, 38 L.Ed.2d 583, 596 (1974), n.15, that if the contract makes arbitration the exclusive and compulsory means for resolving disputes, then these same arbitration provisions themselves give rise to an implied no-strike duty. The Supreme Court went on to emphasize the fact that a *Boys Markets* injunction could be issued on the basis of an implied no-strike duty. It said:

> Thus, an arbitration agreement is usually linked with a concurrent no-strike obligation, but the two issues remain analytically distinct. Ultimately, each depends

---

both sides of the issue. See: Secondary Boycotts—Ally Doctrine, 13 A.L.R. Fed. 466 (1972), and *Local 391* v. *Vulcan Materials Company*, 208 N.L.R.B. No. 81. It is interesting to note, however, that in *Pilot Freight Carriers, Inc.* and *International Bro. of Teamsters*, 208 N.L.R.B. 138 (a unit determination proceeding) the Board found that the Florida operation was not an accretion to Pilot's existing national collective-bargaining unit using many of the same factors relevant in *Vulcan Materials*. (This determination by the Board is the one for which the court in *Boire* v. *International Brotherhood of Teamsters, etc., infra*, issued an injunction.)

> on the intent of the contracting parties. It would be unusual, but certainly permissible, for the parties to agree to a broad mandatory arbitration provision yet expressly negate any implied no-strike obligation. Such a contract would reinstate the situation commonly existing before our decision in Boys Market. Absent an explicit expression of such an intention, however, the agreement to arbitrate and the duty not to strike should be construed as having coterminous application. (38 L.Ed.2d at 594-95)

In the case before this Court, not only is there a mandatory and binding grievance procedure, but there also is an explicit no-strike clause. The contract provides in detail how the parties are to proceed when there is a strike or work stoppage. The Court need not examine whether the contract has specifically covered the fact situation in this case. It is enough to say that the parties have entered into a contract which, either by express language or at least by implication, subjects any dispute concerning a strike or work stoppage to the mandatory settlement provisions of the contract. In addition to *Monongahela, see Northwest Airlines, Inc.* v. *Air Line Pilots Ass'n, Inter.*, 442 F.2d 251 (8th Cir. 1971) which also held that the crossing of picket lines was a proper subject of arbitration.

Article 9 of the N.M.F.A. in no way changes this conclusion.[3] It only preserves the right to cross a primary picket

[3] The Court cannot accept the argument that the refusal to cross a picket line does not involve a dispute between the union and the employer which is subject to arbitration. Not only does *Monongahela* conclude otherwise, but in *Gateway Coal Co.* v. *Mine Workers, supra*, the Supreme Court rejected a similar type of contention when it was argued that safety matters were foreign to the arbitration process. The Court concluded: "Certainly industrial strife may as easily result from unresolved controversies on safety matters as from those on other subjects, with the same unhappy consequences of lost pay, curtailing production, and economic instability." 38 L.Ed.2d at 593. In the present case, the dispute clearly involves a matter suitable to the arbitration

line without such action being a violation of the contract. It in no way rescinds the express and implied no-strike clauses in the parties' contracts. *See Gateway Coal Co.* v. *Mine Workers, supra.* In fact, it does not even purport to cover *all* picket lines. In light of Article 9, it would even appear by negative inference that crossing a secondary picket line could be a violation of the contract, and thus the question of whether a picket line is primary or secondary could itself be an arbitrable matter in each dispute. In such case, it would seem self-evident that the parties intended to submit such question to their grievance procedure, rather than immediately resort to self-help. In any event, in order to encourage arbitration and to prevent industrial strife, the Court cannot but conclude that the parties must use their mandatory grievance procedure to settle the dispute over whether an employee has a right to refuse to cross a picket line.

A similar conclusion was reached on similar facts by the court in *NAPA Pittsburgh, Inc.* v. *Automotive Chauffeurs, etc.*, 363 F.Supp. 54 (W.D.Pa. 1973). There, the court had before it a refusal to cross a picket line in a situation similar to the instant case. The parties had a broad arbitration provision in their contract also. They also had a reservation of rights clause in regard to crossing primary picket lines. In granting an injunction, the court stated:

> The Contract contained, under Article XIII, a specific provision for picket lines. In light of this specific provision it would seem that the question of the right to cross a picket line was made part of the Agreement over which the arbitration clause became a compulsory method of procedure which this Court must enforce.

---

process. In fact Section 5 of Article 9 of the N.M.F.A. itself provides for the filing of a grievance claiming violation of that article. This positively refutes defendants' contention that a claimed violation of Article 9 does not involve a grievance or dispute arising out of the contract, or that the dispute is not an arbitrable matter.

> It is noted that it is not the Court's role to make an independent examination of the merits of the dispute and we have not done so. We have confined ourselves solely to an analysis of the case at bar through the contractual language of the Collective Bargaining Agreement as set forth by the parties. (363 F.Supp. at 57-8).

In determining whether a dispute is within the mandatory settlement provisions of a contract, the Court is bound to view the language liberally in favor of arbitration. As stated in *Monongahela,* at 1213: "The Supreme Court has stated that courts should liberally construe such agreements, resolve all doubt in favor of arbitration, and order arbitration unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." Here there is no express provision excluding this dispute from the grievance machinery, nor is there a forceful evidence of a purpose to exclude the controversy from grievance. *Gateway Coal Co.* v. *Mine Workers, supra,* n.10, 38 L.Ed.2d at 593. In fact, the contract evidences the opposite conclusion—that the parties actually intended to include these disputes over crossing a picket line within their grievance machinery. (See footnote 3).

The defendant union makes the additional argument that this matter is not the proper subject of arbitration since the resolution of the dispute concerns the question of whether Local 512's picket line is illegal in violation of 29 U.S.C. § 158(b)(4). The union claims that that matter is within the exclusive jurisdiction of the National Labor Relations Board. Assuming this to be the case, it is not unusual that the parties will have contracted to arbitrate an issue that may also fall within the Board's jurisdiction. In fact, this same situation arose before this Court when it was contended that the Florida operations of Pilot were an accretion to its operations in other states. In that case, this Court ordered the issue be submitted to grievance

even though the Board might have, and ultimately did take, jurisdiction of the controversy also. *See Pilot Freight Car., Inc.* v. *International Bro. of Team., etc.*, 353 F.Supp. 869 (M.D.N.C. 1972). When the Board began its unit determination hearing (see footnote 2), it sought an injunction pending decision, and the matter came before the Fifth Circuit in *Boire* v. *International Brotherhood of Teamsters, etc.*, 479 F.2d 778 (5th Cir. 1973). There the court specifically agreed with the position of this Court and held that the arbitrator's decision must ultimately defer to the Board's ruling. Thus as stated in *Radio Television Technical School, Inc.* v. *N.L.R.B.*, 488 F.2d 457, 461 (3rd Cir. 1973): "Although it is the well established policy of the Board to encourage settlement of labor-management disputes through the machinery of arbitration, the Board is not duty bound to defer to every decision of an arbitrator." The court in *Boire, supra*, at 803, noted the advantages of having arbitration take place even when the Board has jurisdiction over the dispute:

> For example, had the arbitrator decided *against* the Teamsters, further Board proceedings quite possibly would have been rendered unnecessary. In addition, in cases such as *Carey*, when the representational question is often strongly tied into contract interpretation rather than a pure unit determination, the need for receiving a final construction of the contract is readily apparent.

In the instant case, the grievance committee's decision only involves Local 391's right to honor the picket line, and as far as the Court can determine, does not purport to affect the right of Local 512 to picket. Thus in this case there appears little chance of direct conflict between the grievance committee's decision and a Board ruling. However, even if there were a real possibility of conflict, that would not be an unusual situation, and it would not very likely dissuade the Court from enforcing the arbitration provisions of the contract.

The Court concludes that the dispute in this case falls under the mandatory grievance adjustment procedure provisions of the parties' contract, and that there is no serious danger that an order enforcing the grievance procedure will undermine the authority of the National Labor Relations Board. Therefore, the Court will order arbitration as a condition for the issuance of an injunction.[4]

Since the three guidelines for issuing a *Boys Markets* injunction, as set out above, have all been met, the only remaining question is whether an injunction would be appropriate in this case under ordinary principles of equity. The Supreme Court in *Boys Markets*, quoting from the dissent of another case, set out the principles as follows: " 'whether breaches are occurring and will continue, or have been threatened and will be committed: whether they have caused or will cause irreparable injury to the employer; and whether the employer will suffer more from the denial of an injunction than will the union from its issuance.' " (398 U.S. at 254, 26 L.Ed.2d at 212). The Court concludes that those conditions for issuance of an injunction are present in this case. The alleged breach of the contract is continuing. The company has been seriously crippled by the refusal of the employees to cross the picket line. Most departments have been almost completely shut down. The Court concludes that the equities of the situation lie in favor of the company. The parties contracted for a mandatory grievance process. That process includes attempting

[4] The defendants make some claim that the decision by the National Grievance Committee (See Finding No. 14) has decided the issue. That decision only involved Local 728 in Georgia, and did not purport to determine Local 391's rights under its contract. It never mentioned Article 44 of the Supplemental contracts before this Court, nor did it or could it affect Pilot's grievances under the Maintenance and Office agreements. Furthermore, while the Court has doubts about the scope of the decision, it is sufficient to note that the decision itself appears to be a less than complete interpretation of Article 9 of the N.M.F.A. The Court concludes that the decision does not affect the present case.

to resolve disputes over the refusal to cross another union's picket line. If the union did not wish to have to go to grievance over whether it could cross a picket line, it could have explicitly exempted the refusal to cross any picket line from the grievance procedure, rather than just exempting the refusal to cross primary lines. *Gateway Coal Co.* v. *Mine Workers, supra.* Having elected only to reserve its rights in regard to primary picket lines, the union may not now be heard to complain because it now has to submit the matter to grievance rather than immediately honoring Local 512's picket line. The strong policy in favor of the arbitration of labor disputes, *United Steelworkers* v. *Warrior & G. Nav. Co.*, 363 U.S. 574, 80 S.Ct. 1347, 4 L.Ed. 2d 1409 (1960), must prevail over the union's desire to immediately exercise its alleged rights under the contract.

The Court finds that Local 391 is the agent of International. See Finding No. 5 and the cases cited therein. This case appears to present a stronger showing of agency and direct involvement due to International's payment of out-of-work benefits to members of Local 391 because of the work stoppage resulting from employees honoring the picket line of Local 512. Further, the advice given by Local 391 in posters and letter to its members, and the out-of-work supplements, constitute affirmative conduct in support of the work stoppage. It has a duty "under the collective bargaining agreement to do all within its power to terminate any conduct by its members which violated the agreement." *Monongahela, supra,* at 1214-15.

III.

Conclusions of Law

1. The Court has jurisdiction of this matter pursuant to 29 U.S.C. § 185.

2. The dispute or controversy between the parties involving the refusal of those Pilot employees who are members of Local 391 to cross the picket line set up at Pilot's terminals is a matter subject to the mandatory grievance

procedures of the parties' contracts, and thus this Court has authority under *Boys Markets* to issue an injunction.

3. The Court concludes that the equities of the situation favor the employer and that an injunction ought to issue in order that the parties may exhaust their mandatory grievance procedures.

4. The Court concludes that Local 391 is acting as the agent of International in the present situation, and that International is itself directly involved in aiding the members of Local 391.

IT IS, THEREFORE, ORDERED:

1. That defendant Local 391 and defendant International, their officers, agents, attorneys, and persons acting in concert with them be, and hereby are, enjoined and directed, pending trial of this cause on its merits, or a valid and proper exhaustion of contractual remedies, to end the work stoppage now in effect by forthwith notifying the members of Local 391 that the right to cross Local 512's picket line set up at plaintiff's terminals is now a matter which is subject to their grievance procedure and that any member who relies upon his alleged contractual rights to refuse to cross such picket line would be acting in violation of this injunction.

2. That defendant Local 391 and defendant International, their officers, agents, attorneys, and persons acting in concert with them will take immediate affirmative action to end the work stoppage and encourage the members of Local 391 not to rely upon their alleged contractual rights in deciding not to cross Local 512's picket line set up at plaintiff's terminals, and that they are free to resume their work for the plaintiff.

3. That defendant Local 391 and defendant International, their officers, agents, attorneys, and persons acting in concert with them are hereby enjoined and restrained from taking any action either verbal or financial which would aid, assist, encourage, or any way support the decision of any

member of Local 391 to honor Local 512's picket line at plaintiff's places of business.

4. That defendant Local 391 and defendant International, their officers, agents, attorneys, and persons acting in concert with them be, and hereby are, enjoined and restrained from calling or causing any strike, slow-down, work stoppage, or similar concerted activities among the plaintiff's employees during the pendency of this cause because of any of the issues involved herein so as to affect the operations of plaintiff's business.

5. It is a condition of this order that the plaintiff shall file in the office of the Clerk of this Court a bond approved by said Clerk in the amount of $150,000, by which the plaintiff shall undertake and agree that in the event it is finally determined that this order should not have issued, then the plaintiff will pay the defendant such damages, up to the aforesaid amount, as the defendant may have suffered by reason of the issuance of this order.

6. This order shall become effective at 12:00 noon on Saturday, April 6, 1974, or as soon thereafter as the bond required herein is filed by the plaintiff.

7. This order is conditioned upon the plaintiff's proceeding promptly and in due course to comply with the mandatory grievance procedures set forth in the contracts, and submit for grievance the issues raised before this Court which concern Articles 8 and 9 of the N.M.F.A. and Article 44 of the Supplemental agreements, and the corresponding provisions in the Maintenance and Office agreements. This order shall remain in full force and effect pending resolution by the respective grievance committees whereupon application may be made to this Court for further orders in this matter.

/s/ Hiram H. Ward
United States District Judge

April 4, 1974.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No.

PILOT FREIGHT CARRIERS, INC., *Plaintiff*,

versus

LOCAL 391, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA; R. V. DURHAM; J. H. CHURCH; T. W. BOGER; D. F. BEASLEY; BOBBY J. VESTAL; JOHN P. HANES; JAMES WILLIAM LAUCK; and INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, *Defendants.*

ORDER

This is a Rule 8 petition brought to me as a single circuit judge to stay an order of the United States District Court for the Middle District of North Carolina. I have determined that it is impracticable to convene a panel of three judges. On April 4, 1974, the district judge enjoined Local 391 and the International Union and others to end a "work stoppage" at Pilot's place of business at Kernersville, North Carolina. Judge Ward stayed his own order to permit the defendants an opportunity to seek a Rule 8 hearing before a circuit judge. I heard the matter on April 5 at Winston-Salem.

I am inclined to believe that the defendants will prevail on the merits of the appeal. This case seems to fall between *Monongahela*[1] and *Amstar*.[2] I think that *Monongahela* presently represents the outer limit of the *Boys Markets* injunction.[3] In *Monongahela*, contrary to the po-

[1] Monongahela Power Co. v. Local No. 2332, IBEW, 484 F.2d 1209 (4th Cir. 1973).

[2] Amstar Corp v. Amalgamated Meat Cutters, 468 F.2d 1372 (5th Cir. 1972).

sition of the Fifth Circuit in *Amstar,* we held that a dispute over the right to stop work without the presence of an initial or underlying dispute might itself be an arbitrable grievance. In *Monongahela* there was no attempted express reservation of the right to strike or otherwise stop work. Here there is, and it may be enough to distinguish *Monongahela.* Article 44 of the Carolina Freight Council Supplemental Agreement is a broad prohibition against strikes without first using all means of settlement. Article 9 of the National Master Freight Agreement expressly recognizes the right of any employee to honor a primary picket line. The two clauses together bring to mind what Mr. Justice Powell has written in *Gateway Coal Co.* v. *Mine Workers:*

> It would be unusual, but certainly permissible, for the parties to agree to a broad mandatory arbitration provision yet expressly negate any implied no-strike obligation. Such a contract would reinstate the situation commonly existing before our decision in *Boys Market.*

38 L.Ed.2d 583, 595 (1974).

I think there is some degree of probability that the ultimate result on appeal will be to adhere to *Monongahela* but to distinguish its application by reason of Article 9.

If it be assumed, however, that *Monongahela* controls this appeal, I think the defendants will likely prevail anyway. Local unions in Atlanta and Dalton, Georgia, submitted an identical dispute to arbitration and obtained from the National Grievance Committee a determination that Pilot violated the provisions of Article 9 by applying for injunctive relief. I interpret this to necessarily mean that the employees did *not* violate Article 44 by refusing, pursuant to Article 9, to cross the primary picket line of Local 512.

As to whether the picket line is primary or secondary, it is enough to note for purposes of this order that Pilot has attempted unsuccessfully to have the NLRB characterize it as illegal secondary activity. Since it is a picket line by a local union of employees working for Pilot and is established only at places of business of Pilot, it would seem on its face not to be secondary.

Under *Boys Markets* a United States District Court may not issue an injunctive order until it first holds that the work stoppage is "over a grievance which both parties are contractually bound to arbitrate." *Boys Markets*, 398 U.S. at 254, *quoting Sinclair Refining Co. v. Atkinson*, 370 U.S. 195, 228 (1962) (Brennan, J., dissenting). The underlying grievance here is the refusal of Pilot to recognize and bargain with Local 512 in Jacksonville, Florida. Because there is no contract, and indeed no legal relationship as yet, between Pilot and Local 512, there is obviously no duty to arbitrate the refusal to recognize and bargain. Thus the only possible arbitrable issue is the relationship between Article 9 and Article 44 and the question of interpretation as to whether Article 9 is an exception to Article 44. It seems to me that it is and that Article 9 removes this case from the application of *Monongahela*. But I need not so decide, for it is reasonably clear that the National Grievance Committee has so held. It is true that the Grievance Committee did not mention Article 44 and its relationship to Article 9, but it is inconceivable that the Committee would not have considered the relationship had it been requested to do so.

It is disheartening that both the plaintiff and the defendants will unquestionably suffer irreparable injury if the stay is granted. Economic loss to the company has been estimated at $150,000 a day. Economic loss to the employees is at the rate of some $200 per employee per week, and some 600 workers have ceased work at Kernersville alone. The economic injury that each party may in-

flict upon the other is tragic. But as far as the ingredient of irreparable injury to the defendants, essential to the granting of a stay order, it is enough to note the public policy of the United States as expressed by the Congress. 29 U.S.C. § 104 protects the right of workers to cease or refuse to perform any work, and 29 U.S.C. § 163 reiterates the purpose of the Congress not to interfere with or impede or diminish in any way the right to strike. Thus a *Boys Markets* injunction necessarily involves irreparable injury to the economic power of a labor union to obtain recognition. Because the Congress has determined that the individual unorganized worker is commonly helpless to exercise actual liberty of contract and that he therefore must be free to associate with his fellows and act through a labor union, including the right to strike, I believe the public interest will be served by granting the stay despite substantial and continuing harm to Pilot.

In summary, I am unable to discern in this case any grievance dispute susceptible of arbitration. The real dispute is whether Pilot should recognize and bargain with Local 512, and the resultant dispute is whether there is the right to honor a picket line—which has been submitted to arbitration and has been decided against Pilot. I believe there is nothing that the courts can do to resolve the status of Local 512. Failing voluntary recognition by Pilot, this question can only be resolved by a bargaining order or an election. The public interest would seem to require that the NLRB either issue a bargaining order, if appropriate under *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575 (1969), or require an immediate election.

Thus far, Pilot has sought injunctive relief in at least five United States District Courts. It was initially successful in the suit brought in Atlanta, but that preliminary injunction was subsequently dissolved after the decision of the Grievance Committee. Presently the status of this multistate litigation is that injunctive relief for Pilot has

been denied in all districts except this one. *See Pilot Freight Carriers, Inc.* v. *Local 560, IBT*, Civ. No. 74-339 (D.N.J., April 1, 1974); *Pilot Freight Carriers, Inc.* v. *International Bhd. of Teamsters*, Civ. No. C74-363A (N.D. Ga., April 3, 1974). I have no occasion to reach the question of whether so many efforts in so many districts is wasteful of judicial resources and might be prevented by application of a doctrine of collateral estoppel.

Pursuant to 29 U.S.C. § 110, the appeal is accelerated, and the Clerk is ordered to establish a briefing schedule and schedule the case for hearing at the April 29, 1974, term at Charleston, South Carolina, or the May 6, 1974, term at Richmond, Virginia.

The order of the district court is stayed pending appeal.

This 8th day of April, 1974.

/s/ J. Braxton Craven, Jr.
J. Braxton Craven, Jr.
United States Circuit Judge

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 74-1454

PILOT FREIGHT CARRIERS, INC., *Appellee*

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, ET AL., *Appellants*

No. 74-8036

PILOT FREIGHT CARRIERS, INC., *Plaintiff-Appellee*

v.

LOCAL 391, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, ET AL., *Defendants-Appellants*

Appeals from the United States District Court for the Western District of North Carolina, at Winston-Salem. Hiram H. Ward, District Judge.

Argued April 29, 1974 Decided May 3, 1974

Before HAYNSWORTH, Chief Judge, RUSSELL and WIDENER, Circuit Judges.

David Previant (L. N. D. Wells, Jr., Ian D. Lanoff, Norman B. Smith, Hugh J. Beins, and Renn Drum on brief) for Appellants, in Nos. 74-1454 and 74-8036; J. W. Alexander, Jr., (William Kerns, Blakeney, Alexander and Machen and Deal, Hutchins and Minor on brief) for Appellee in Nos. 74-1454 and 74-8036.

PER CURIAM:

In this case, the district court relied on *Monongahela Power Company* v. *I.B.E.W.*, 484 F.2d 1209 (4th Cir. 1973) and *Boys Markets, Inc.* v. *Retail Clerks Union*, 398 U.S. 235 (1970), in issuing a preliminary injunction enjoining members of Teamsters Local 391 from refusing to cross a picket line set up by Teamsters Local 512 at the Kernersville, N. C. terminal of Pilot Freight, Inc. (Pilot). The employer, and Local 391 are parties to the National Master Freight Agreement, and the district court found that the relationship between Article 44, the no-strike clause of the agreement, and Article 9, a clause which gave individual union members the right to refuse to cross a primary picket line, was an arbitrable matter. Further, the court held that the issue of whether the picketing was primary or not was arbitrable. The union was then successful in obtaining a stay pending appeal under F.R.A.P. 8 from a judge of this court on April 8, 1974. Expedited appeal was granted from both these decisions.

We conclude that the district court reached the correct result in its determination that these matters were arbitrable, but erred in enjoining the individual union members from crossing the picket line. Therefore, we vacate the district court injunction insofar as it applies to individual union members, reinstate the injunction so that Local 391 may not engage in a strike until the issue is further considered by the district court, and, accordingly, vacate the stay pending appeal insofar as it would allow Local 391 to respect the picket line. Further, since we are advised arbitration has already begun on these issues, and is now pending at the level of the Eastern Conference Joint Area Committee, we remand this case for the district court to determine whether the injunction should remain in effect until the arbitration proceeding is final.

The dispute arose when Teamsters Local 512, which was attempting to organize the Jacksonville, Florida, terminal

of Pilot, established roving picket lines at Pilot terminals throughout its system. Many of Pilot's Kernersville employees, who were members of Local 391, refused to cross the picket line and go to work, contending that even though the National agreement had an express no-strike clause, the contract clause allowing them to refuse to cross a primary picket line was an express exception to the no-strike clause. Thus, the union has taken the position from the outset that no arbitrable dispute had arisen, and that whether the picket line was secondary or primary was not arbitrable. The union also contends on this appeal that Pilot has already had these issues arbitrated by the National Grievance Committee in a proceeding which took place while this suit was being heard, and, having lost in that arbitration, cannot arbitrate the same issues again.

Pilot argues that *Boys Markets* and this court's decision in *Monongahela Power Company, supra* control disposition of this case since, even though Article 9 may protect the right of individual employees to respect picket lines, the scope of Article 9 is nevertheless arbitrable. Pilot also contends that the arbitration proceeding already accomplished by the National Grievance Committee did not consider all of the questions raised here. The thrust of Pilot's allegation is that the national Teamsters union has encouraged, financed, fostered and ordered its members to refuse to cross the picket lines of Local 512 which has had the effect of causing a system-wide strike, and that the union has thus attempted to mask this strike as being protected by the rights granted by Article 9 of the agreement. Article 9, Pilot concedes, does give individual employees the right to refuse to cross a primary picket line, but would not allow a directed and concerted refusal on behalf of Local 391.

We first reach the issue of whether Pilot has already had opportunity to arbitrate these issues. That arbitration proceeding was initiated by a grievance filed by Team-

sters Local 728, of Atlanta, Georgia, against Pilot. The factual setting at Atlanta was the same as here, in that Pilot had sought, pending arbitration, an injunction prohibiting Local 728 from respecting Local 512's picket line at their Atlanta facility. A temporary restraining order and order to arbitrate was granted by the district court in Atlanta on March 6, 1974, which order was directed to Local 728, Local 515, and certain individually named members of the two Locals. Local 728 promptly filed its grievance contending that Pilot had violated the rights of its members under Article 9 of the agreement. The grievance was heard by the National Grievance Committee in Chicago, Illinois, on March 20 and 22, 1974. At that hearing, Pilot complained at great length that it had never been informed what specific acts it was charged with doing that violated Article 9. The union responded that Pilot had violated Article 9 by seeking an injunction against individual employees for doing what they were clearly allowed to do under Article 9 of the agreement. The National Committee limited their consideration to this charge, and concluded that Pilot did violate Article 9 by bringing injunctive proceedings against individual employees. After this arbitration hearing, the Atlanta district court, although noting that the National Committee had not dealt with all of the issues in dispute between the parties, nevertheless dissolved the preliminary injunction it had issued because it concluded that Pilot's employees were protected in the factual situation there by Article 9 of the agreement. The Local 728 arbitration, however, necessarily held that the individual employees were protected in their refusal to cross the picket line.

However, we do not think all of the issues raised in the case at hand were arbitrated by that Committee. Pilot presses on appeal that, although individual members, may be protected in their refusal to cross picket lines, the national union acting in concert with the local, may not fur-

ther, encourage, finance, or order its members to refuse to cross such picket lines, and that so doing is a violation of the no-strike clause of the collective bargaining agreement.

The National Master Freight Agreement in the present case does have a mandatory grievance procedure (Article 8) regarding any dispute under the contract. The relationship between the no-strike clause and the clause allowing individual employees to refuse crossing a primary picket line was, we think, an arbitrable matter, as is Pilot's contention that the underlying dispute, whether the local union or national union had directed or influenced concerted activity not to cross the picket line, as opposed to individual employees' decisions not to cross it. On the merits, the arbitration must decide whether Article 9, whatever its scope is found to be, had been complied with or whether the union is using Article 9 as a subterfuge to strike in violation of the agreement. We think the parties intended to submit disputes of this nature to arbitration, and, in any event, we must construe the agreement liberally in favor of arbitration. *United Steelworkers of America* v. *Warrior and Gulf Navigation Co.*, 363 U.S. 564 (1960).

The preliminary injunction of the district court, then, must be vacated as to the individual members, but its preliminary injunction as to the union defendants reinstated. The stay pending appeal is dissolved. Upon remand the district court will consider whether its preliminary injunction should remain in effect as directed to the union defendants during the pending arbitration before the Eastern Conference Joint Area Committee in the proceeding there styled R-125-74, *Pilot Freight Company, Inc.* v. *Local 391.*

The mandate will issue forthwith.

REMANDED.

APPENDIX D

Judgment

Filed May 3, 1974

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 74-8036

PILOT FREIGHT CARRIERS, INC., *Appellee,*

v.

LOCAL 391, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN, AND HELPERS OF AMERICA; R. V. DURHAM; J. H. CHURCH; T. W. BOGER; D. F. BEASLEY; BOBBY J. VESTAL; JOHN P. HANES, JAMES WILLIAM LAUCK; INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, *Appellants.*

APPEAL FROM the United States District Court for the Middle District of North Carolina.

THIS CAUSE came on to be heard on the record from the United States District Court for the Middle District of North Carolina, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the preliminary injunction of the district court is vacated as to the individual members, but its preliminary injunction as to the union defendants reinstated. The stay pending appeal is dissolved. Upon remand the district court will consider whether its preliminary injunction should remain in effect as directed to the union defendants during the pending arbitration before the Eastern Conference Joint Area Committee in the proceeding there styled R-125-74, *Pilot Freight Company, Inc.* v. *Local 391*, consistent with the opinion of this Court filed herewith. The mandate shall issue forthwith.

William K. Slate, II, Clerk

/s/ WILLIAM K. SLATE, II
Clerk

APPENDIX E

Statutory Provisions Involved

Section 4 of the Norris-LaGuardia Act, 47 Stat. 70, 29 U.S.C. § 104 provides:

No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 3 of this Act;

(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;

(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

(e) Giving publicity to the existence of, or the facts involved in any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

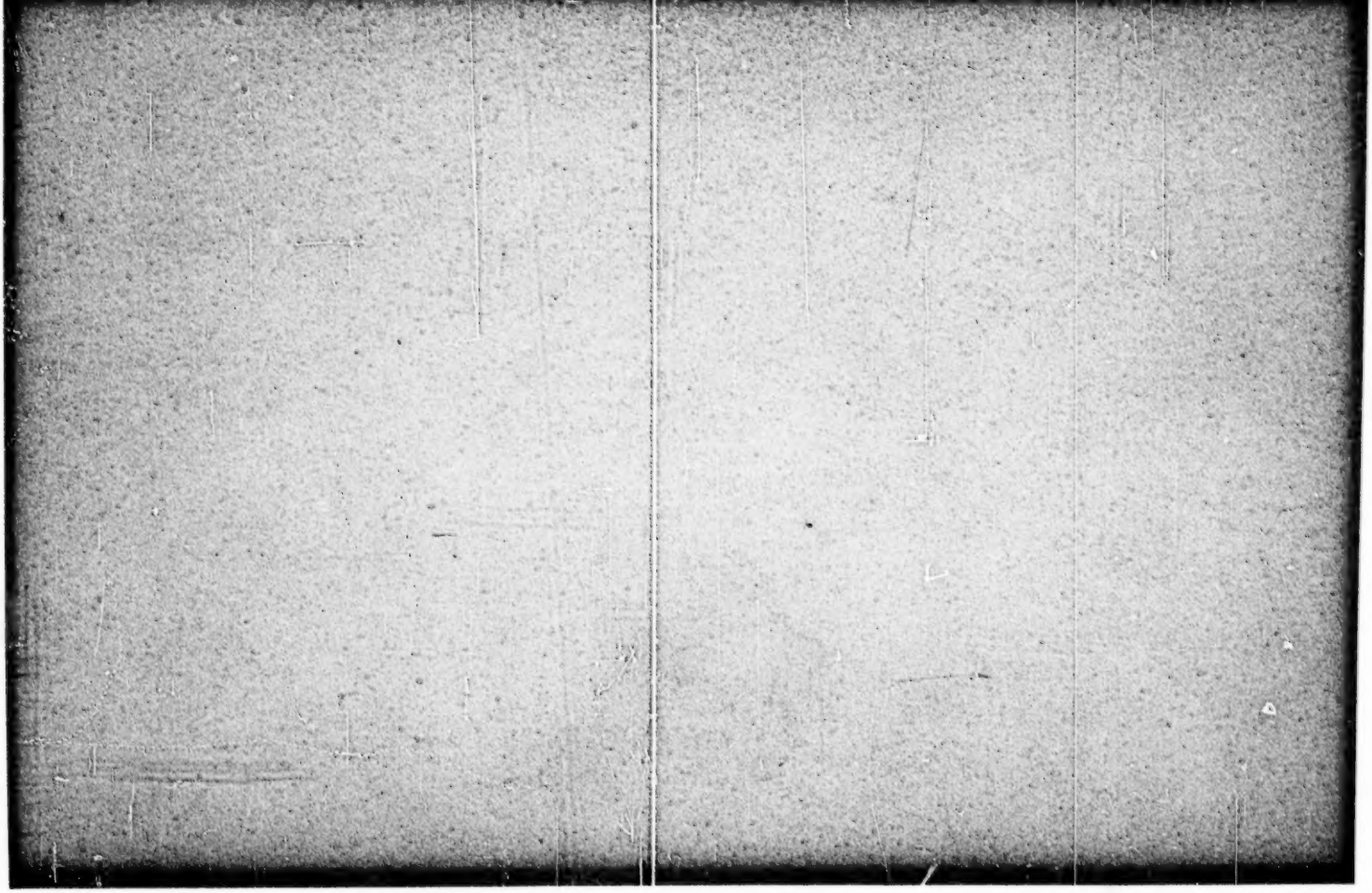
(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 3 of this Act.

Section 301(a) of the Labor Management Relations Act of 1947, 61 Stat. 156, 29 U.S.C. §185(a) provides:

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.





SUPREME COURT, U. S.

FILED

AUG 21 1974

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-48

LOCAL 391, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, ET AL., *Petitioners*

v.

PILOT FREIGHT CARRIERS, INC., *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

SUPPLEMENT TO PETITION FOR CERTIORARI

HUGH J. BEINS
3812 Kanawha St., N.W.
Washington, D. C. 20015

RENN DRUM
206 Pepper Building
Winston-Salem, N.C. 27101

Attorneys for Petitioner Local 391 and Individual Petitioners

GEORGE KAUFMANN
1735 New York Ave., N.W.
Washington, D. C. 20006

Of Counsel

DAVID PREVIANT
GERRY MILLER
211 West Wisconsin Ave.
Milwaukee, Wisc. 53203

L. N. D. WELLS, JR.
8204 Elmbrook Drive
Dallas, Texas 75247

ROBERT M. BAPTISTE
25 Louisiana Ave., N.W.
Washington, D. C. 20001

NORMAN B. SMITH
816 Southeastern Building
Greensboro, N.C. 27301

Attorneys for Petitioner International Brotherhood of Teamsters

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-48

LOCAL 391, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, ET AL., *Petitioners*

v.

PILOT FREIGHT CARRIERS, INC., *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

SUPPLEMENT TO PETITION FOR CERTIORARI

In the Petition for Certiorari we assert a square conflict between the Fourth Circuit, as exemplified by the decision below in this case (*Pilot*) and in the *Monongahela* case (Pet. pp. 7-8), and decisions of the Third and Fifth Circuits, as to the scope of *Boys Markets* v.

Retail Clerks, 398 U.S. 235; we also urge that the Fourth Circuit rule is contrary to *Boys Markets*. We therefore deem it incumbent upon us to advise the Court that the Third Circuit, sitting *en banc*, has now, by a 6-3 vote, agreed with the Fourth Circuit's decision herein. *NAPA Pittsburgh, Inc.* v. *Automotive Chauffeurs, Parts and Garage Employees, Local Union 926, et al.*, decided August 8, 1974. The opinion of the Court (Weis, J.) and the dissenting opinions of Judges Hunter and Adams are reproduced in their entirety as an Appendix hereto and will be referred to as "NAPA".

1. The circumstances under which the *NAPA* case arose are the same as those of the present case. The Third Circuit's majority sought to distinguish the Fifth Circuit's decision in *Amstar* (Pet. pp. 12-13) on the ground that in *Amstar* there was no "contractual provision restricting the union's right to honor picket lines of other labor organizations" (NAPA, p. 6). This description is simply incorrect, since in *Amstar* (as in *Monongahela*) the unqualified no-strike clause carried with it an obligation to cross even primary picket lines, whereas by virtue of their picket line clauses, the employees in *Pilot* (and *NAPA*) were privileged to honor such lines.[1] As Judge Hunter put it, the picket line clause "does not *restrict* appellant's right to strike; [i]nstead, it *enlarges* that right by creating an exception to the agreement's apparently all inclusive no-strike language." (*NAPA* dissent, p. 19, n. 14). It was for this reason that Judge Craven, the author of *Monongahela*, granted a stay herein (Pet. p. 9, 20a-22a) and

[1] It is to be noted that the condition that a picket line be "primary", *NAPA* p. 3, is compelled by § 8(e) of the LMRA. *Local 413, IBT* v. *NLRB*, 334 F.2d 539, 542-543 (C.A.D.C.).

why petitioners are entitled to prevail on the merits of part b) of the Question Presented by the Petition for Certiorari (Pet. p. 2).

This disparity of views regarding the precise and recurrent situation of these cases would itself warrant the grant of certiorari. But it is even more significant that while attempting to limit *Amstar* to its facts, the Third Circuit did not meet the Fifth Circuit's critical holding, based on its reading of *Boys Markets*, that an injunction may be issued only against a work stoppage which is " 'over' an arbitrable grievance" (468 F.2d at 1373). That understanding is shared by the Second, Seventh and Ninth Circuits in the cases cited at Pet. p. 15, n. 11, none of which can be reconciled with the results in *NAPA* or *Pilot*.

2. This is not the proper occasion to expound on the merits of the conflict. But our contention (Pet. pp. 15-16), that the granting of an injunction against a work stoppage where the only arbitrable issue is the legality of that work stoppage is inconsistent with *Boys Markets'* holding that an injunction can be granted only if the Court has determined that "breaches are occurring and will continue, or have been threatened and will be committed" (398 U.S. at 254), and thus devitalizes the Norris-LaGuardia Act, is confirmed on the face of the *NAPA* opinion:

> "We hold that determination of whether the picket line should be classified as primary or secondary was arbitrable under the terms of the contract and pending resolution of the question Local 926 was properly enjoined from causing a work cessation. Requiring arbitration *does not nullify the union's right to honor a primary picket line,*

> *but only suspends the exercise of the right* until its existence is established by an arbitrator's decision". (*NAPA*, p. 6, emphasis added)[2]

It is precisely such judicial reasoning which the Norris-LaGuardia Act was adopted to foreclose. For Congress approved, and endowed with the force of law, the contrary analysis of Messrs. Frankfurter and Greene:

> "The suspension of activities affects only the strikers; the employer resumes his efforts to defeat the strike, and resumes them free from the interdicted interferences. Moreover, the suspension of strike activities, even temporarily, may defeat the strike for practical purposes and foredoom its resumption, even if the injunction is later lifted."[3]

To remind the lower courts that *Boys Markets* is not a departure from these teachings, but authorizes an injunction only under special conditions painstakingly

---

[2] With respect to the other side of the *Boys Markets* equation (promotion of arbitration), we invite attention to Judge Hunter's showing that "if this basic cause-effect relationship between arbitrable issue and the strike is not present, the strike will not discourage arbitration and the policy that favors the arbitration of labor disputes will not be furthered by the issuance of an injunction." (*NAPA* dissent, p. 18).

[3] *The Labor Injunction*, p. 201 (1930). This Court has agreed:

> "The truth is that authorizing the issuance of a temporary injunction as is frequently true of temporary injunctions in labor disputes, may effectively dispose of petitioner's rights * * *." *Liner* v. *Jafco, Inc.*, 375 U.S. 301, 308 quoting *Construction Laborers* v. *Curry*, 371 U.S. 549, 550.

As Judge Hunter explained:

> "Since strikes like the present one are a response to specific disputes over which the union has no control, they are highly dependent upon timing for their success, and a minimum delay of this magnitude will render many of them ineffective." (*NAPA* dissent, p. 15)

delineated by this Court, certiorari should be granted in this case.

Respectfully submitted,

HUGH J. BEINS
3812 Kanawha St., N.W.
Washington, D. C. 20015

RENN DRUM
206 Pepper Building
Winston-Salem, N.C. 27101

Attorneys for Petitioner Local 391 and Individual Petitioners

GEORGE KAUFMANN
1735 New York Ave., N.W.
Washington, D. C. 20006

Of Counsel

DAVID PREVIANT
GERRY MILLER
211 West Wisconsin Ave.
Milwaukee, Wisc. 53203

L. N. D. WELLS, JR.
8204 Elmbrook Drive
Dallas, Texas 75247

ROBERT M. BAPTISTE
25 Louisiana Ave., N.W.
Washington, D. C. 20001

NORMAN B. SMITH
816 Southeastern Building
Greensboro, N.C. 27301

Attorneys for Petitioner International Brotherhood of Teamsters

APPENDIX TO SUPPLEMENT

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 73-1798

NAPA PITTSBURGH, INC.,

Appellee,

v.

AUTOMOTIVE CHAUFFEURS, PARTS AND GARAGE EMPLOYEES, LOCAL UNION 926, et al.,

Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA
Civil Action No. 73-764

Argued February 28, 1974

Before: HUNTER and WEIS, *Circuit Judges*, and BECKER, *District Judge*.

Submitted in banc June 12, 1974

Before: SEITZ, *Chief Judge*, and VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS and GARTH, *Circuit Judges*.

Elmer E. Myers, Esquire
David H. Perez, Esquire
R. A. King, Esquire
Buchanan, Ingersoll, Rodewald,
Kyle & Buerger
1800 Oliver Building
Pittsburgh, Pennsylvania 15222
Attorneys for Appellees.

Herman L. Foreman, Esquire
James B. Brown, Esquire
Rothman, Gordon, Foreman
& Groundine
300 Grant Building
Pittsburgh, Pennsylvania 15219
Attorneys for Appellants.

OPINION OF THE COURT

(Filed August 8, 1974)

WEIS, *Circuit Judge.*

This is an appeal from an order enjoining appellant Automotive Chauffeurs, Parts and Garage Employees, Local Union No. 926 (Local 926) from refusing to cross a picket line maintained by the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 110 (Local 110). The question presented is whether the district court erred in issuing a preliminary injunction against Local 926 and in ordering arbitration of the differences between the parties in accordance with the provision of the collective bargaining agreement. We conclude that the action of the trial court was proper and we affirm.[1]

Plaintiff-appellee, NAPA Pittsburgh, Inc., is a corporation with its executive offices and principal place of business on Hamilton Avenue in Pittsburgh, Pennsylvania. Appellant, Local 926, represents approximately 54 of 110 employees at the Hamilton Avenue facility for collective bargaining purposes. A work stoppage occurred at this

---

1. After the appeal in this case was filed, appellee submitted a motion to dismiss that suggested the issue had become moot since Local 110 was no longer maintaining a picket line. This claim is without merit. Appellee posted a $5,000 bond to indemnify appellant for attorneys' fees and any injury suffered in the event it would be determined that the injunction was improvidently granted. Since appellant's right to indemnification depends upon a decision on the merits, the case is not moot. Liner v. Jafco, 375 U.S. 301 (1964).

location as a result of the efforts of a second union, Local 110, to represent the employees of a company located in Altoona, Pennsylvania, doing business under the name of NAPA Altoona, Inc.[2] In order to promote its endeavors, Local 110 called a strike at the Altoona facility and began picketing there. For reasons that do not appear in the record, they decided to extend the picketing to the NAPA Pittsburgh building on Hamilton Avenue.

When this occurred, appellant, Local 926, informed its Hamilton Avenue members that they could refuse to cross Local 110's picket line. The union based this position on Article XIII of its collective bargaining agreement with appellee, which provides:

> "It shall not be a violation of this Agreement . . . in the event an employee refuses to enter upon any property involved in a primary labor dispute or refuses to go through or work behind any primary picket lines . . . at the Employer's [NAPA Pittsburgh's] place or places of business."

As a result of this stand, a work stoppage occurred at the Hamilton Avenue facility.

NAPA Pittsburgh's response was to seek injunctive relief from the district court. The company argued that a question existed as to whether the picket line that Local 926 chose to honor was "primary" within the meaning of Article XIII, and contended that this issue was subject to the mandatory arbitration and no strike provisions contained in the collective bargaining agreement. The circumstances thus were alleged to bring the case within the

2. The district court never determined the exact relationship between plaintiff-appellee NAPA Pittsburgh and NAPA Altoona. However, appellee concedes that NAPA Pittsburgh had "potential control" of NAPA Altoona (Brief of Appellee at 3.) and at the hearing before the district court held September 7, 1973 appellee's attorney indicated his belief that the two companies had interlocking directorships and, in most cases, common officers (Appendix at 43a.). Appellant asserts that the two are in fact a single company with headquarters at Hamilton Avenue in Pittsburgh. Clarification of this relationship would be important to determine the question of whether the picket line was primary or secondary.

Boys Markets exception to the anti-injunction provisions of the Norris-LaGuardia Act.[3]

After a hearing, the district court found that the employees' right to honor a picket line at the Hamilton Avenue plant was limited by the terms of the collective bargaining agreement and that the arbitration clause provided the compulsory method of resolving a dispute over the exercise of the privilege. *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235 (1970) was held to be applicable, and a preliminary injunction was issued ordering that the work stoppage be ended and the parties begin arbitration of their differences.

In cases of this nature we start with the basic premise that the law favors arbitration of labor disputes. That there can be no doubt about this is clear from the pronouncements of the Supreme Court in the Steelworkers' Trilogy—*United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); and *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). The most recent reaffirmation of the policy may be found in *Gateway Coal Co. v. United Mine Workers of America, et al.*, 42 U.S.L.W. 4095 (U.S. Jan. 8, 1974).

Boys Markets, Inc. v. Retail Clerks Union, Local 770, supra, holds in essence that where a matter has been made arbitrable by the terms of a contract between the union and the company, an injunction may be issued to enforce this method of settling controversies between the parties. In determining whether a matter is arbitrable under the contract, any doubt should be resolved in favor of arbitration. *United Steelworkers v. Warrior & Gulf Navigation, supra.*

---

3. The company here concedes that the NLRB has authority to secure an injunction against secondary picketing but contends that this does not deprive the employer of the right to seek an injunction under §301 of the Labor Management Relations Act, 29 U.S.C. §185. We agree that this is a correct statement of the law. *See* Arnold v. Carpenters District Council, — U.S. —, 42 U.S.L.W. 4754 (U.S. May 20, 1974).

Here, the parties agreed to arbitrate ". . . any and all grievances, complaints or disputes arising between the employer and the union . . ." The collective bargaining agreement also provided that it would not be a violation of the contract if an employee honored a primary picket line. Obviously then, it would be a breach of the agreement if the employees honored a picket line which was not primary.

The contractual provisions are clear but the parties disagree as to whether the picket line involved in this case was "primary." The union says that it was; the company denied it.[4] Both contend vigorously that they are correct. This is clearly a "dispute" and hence covered by the contractual requirement of arbitration.

If it should be determined that a "primary" picket line was present at the plaintiff's plant, then unquestionably Local 926 could refuse to cross. If it was "secondary," then the company had the right to insist that the union honor its no strike agreement.

The union relies on the holdings of *Amstar Corp. v. Amalgamated Meat Cutters & Butcher Workmen*, 468 F.2d 1372 (5th Cir. 1972); *General Cable Corp. v. International Brotherhood of Electrical Workers*, 331 F. Supp. 478 (D.C. Md. 1971); and *Simplex Wire and Cable Co. v. Local 2208 of the International Brotherhood of Electrical Workers*, 314

---

4. In his memorandum of September 11, 1973, the district judge wrote:

"The testimony showed that Local 926 instructed its members that it would not be a violation of its contract if any of the members refused to enter upon the premises at 6550 Hamilton Avenue because this was a primary picket line and the contract specifically provided it would not be a cause for discharge or disciplinary action for an employee to refuse to enter the premises where there was a primary picket line." (Appendix at 49a)

* * * * *

"The alleged dispute in the instant case concerns the honoring of another union's picket line." (Appendix at 51a)

During the hearing before the district court, counsel for the union also made clear that he was contending that the picket line was primary. (Appendix at 42a-45a)

The record in the district court makes clear that the disagreement between the parties revolves around the pivotal issue of whether there was a primary picket line. *See* Boys Market v. Retail Clerks Union, Local 770, *supra* at 237-38, 254.

F. Supp. 883 (D.C. N.H. 1970), but these opinions are clearly distinguishable. In none of the cited cases was there a contractual provision restricting the union's right to honor picket lines of other labor organizations. Indeed, the district court in the *Simplex* case, *supra*, specifically noted the omission of any reference to the subject in the contract between the parties in that case.

By way of contrast, the Court of Appeals in *Monongahela Power Co. v. IBEW*, 484 F.2d 1209 (4th Cir. 1973), held that an injunction could be issued to enforce a no strike clause in a contract even though it had no provision applicable to honoring a picket line of another union. In a later case, *Pilot Freight Carriers v. Teamsters*, — F.2d —, (No. 74-8036, 4th Cir. May 3, 1974), the same court sustained an injunction against a union honoring a picket line where the contract contained language similar to the one *sub judice*, and held that the matter was arbitrable.

We hold that determination of whether the picket line should be classified as primary or secondary was arbitrable under the terms of the contract and pending resolution of the question Local 926 was properly enjoined from causing a work cessation. Requiring arbitration does not nullify the union's right to honor a primary picket line, but only suspends the exercise of the right until its existence is established by an arbitrator's decision. Undue delay should not be permitted since the district court has ample authority in the exercise of its equitable powers to see to it that arbitration proceeds promptly and expeditiously.

The order of the district court will be affirmed.

HUNTER, *Circuit Judge*, with whom SEITZ, *Chief Judge*, joins, dissenting:

The majority begins its discussion of the merits of the case by referring to "the basic premise that the law favors arbitration of labor disputes." It then goes on to empha-

size one key point: that the dispute between the Company and Local 926—over whether Local 110's picket line is primary or secondary and thus whether Local 926's work stoppage is legal—is an arbitrable dispute. Our response is wholehearted agreement. The law does favor arbitration in this area, and the dispute over the nature of the Local 110 picket line *is* arbitrable. Moreover, we note that the district court found the issue to be arbitrable *and that the appellant Union does not dispute this finding.*[1]

We feel that this last point is of great significance in view of the position taken by the majority. Since everyone, including the appellant union, agrees that this issue is arbitrable, the majority's conclusion that the Company-Local 926 dispute is arbitrable, while undoubtedly correct, does not address itself to the issue raised by appellant and therefore cannot resolve the question presented by this appeal.

Thus, we must begin with a formulation of the issue we are called upon to resolve. In our opinion that issue can be framed in the following way: given the fact that the issue as to the legality of the Local 926 work stoppage is arbitrable, should the district court be able to involve itself in this dispute by enjoining the work stoppage until an arbitrator can decide its legality?

One possible resolution of this question is to conclude that the federal courts can always intervene and issue an injunction against a strike whenever the resolution of an arbitrable dispute might end it.[2] This is the implicit conclusion of the majority. Since we feel this decision is not

---

1. The appellant does argue at great length that the "underlying" dispute is not arbitrable. However, as it makes clear even in the initial statement of its first argument, the dispute that it refers to as the "underlying dispute" is the fight between the Company and Local 110 (Brief of appellant at 7). Since this dispute did not concern Local 926 in any way, it obviously was not arbitrable under the terms of Company-Local 926 collective bargaining agreement.

With regard to the Company-Local 926 dispute as to the legality of the Local 926 work stoppage, appellant's brief never takes issue with the district court's finding of arbitrability.

2. Here, resolution of the arbitrable issue will end the work stoppage if the arbitrator rules in the Company's favor. Obviously, if the union wins, the work stoppage will continue.

supported either by a reasoned balancing of the legal policies at stake or by the precedent, we dissent.

I. Policy Considerations

Once we get beyond the majority's discussion of the arbitrability of the primary-secondary issue, its decision rests primarily upon the Supreme Court's decision in *Boys Markets*.[3] Our disagreement with their holding comes down to a disagreement over the scope of the rule first enunciated in that case. However, we will defer our explanation of the *Boys Markets* holding until we have reviewed the policy impact of *Boys Markets* and contrasted it with the policy impact of the majority's decision in this case. We do this because we believe that the key to understanding the scope of the *Boys Markets* rule (and its lack of applicability here) lies in an understanding of its intended impact upon competing legal policies.

Boys Markets involved a dispute between an employer and union over the right of union employees to perform certain tasks at the employer's store. This was a dispute that the Union, in its collective bargaining agreement, had agreed to resolve through the presentation of reasoned arguments to a neutral arbitrator, rather than through the use of economic force, i.e., by means of a strike. However, in that case, the union ignored both its no strike pledge and its agreement to arbitrate the issue and struck for the avowed purpose of forcing a favorable resolution to the arbitrable dispute. Thus, the union's actions made it clear that they did not intend to return to work until the Company conceded that the tasks involved had to be performed by union men.

Clearly, this strike had the effect of undermining the rule of law that favors the arbitration of labor disputes, since the strike was an attempt to force a union victory on

---

3. *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235 (1970).

the very issue that was made arbitrable not through the presentation of reasoned arguments to a neutral arbitrator, but rather through the use of sheer economic force. If the tactic had been successful, it would have settled the arbitrable dispute, making arbitration superfluous and thereby defeating the arbitrator's jurisdiction. Thus, the strike represented a plain attempt by the union to undermine and avoid its agreement to arbitrate the issue in dispute and the legal policy that favors the arbitration of labor disputes cut clearly in favor of having the district court issue an injunction to end the work stoppage.

However, the Court could not decide the case with a simple citation to this policy effect, for though the issuance of an injunction ordering an end to the strike plainly promoted arbitration, it just as plainly interfered with the clear policy directive of Congress contained in the Norris-LaGuardia Act, 29 U.S.C. § 104 (1970). That section in essence strips federal courts of the power to enjoin strikes.[4] Faced with this clear conflict between two policies of law, the Supreme Court chose to create a "narrow"[5] exception to the anti-injunction provisions of the Norris-LaGuardia Act so that the court had the power to prevent the Union from undertaking a course of conduct that was plainly designed to circumvent and defeat its explicit agreement to arbitrate.

In the instant case, the policy considerations that provide the *raison d'etre* for the *Boys Markets* decision are totally absent. Stated simply, while the policy enunciated in the anti-injunction provisions of the Norris-LaGuardia Act will be frustrated here just as it was in *Boys Markets* if an injunction is issued, the policy that favors the arbi-

---

4. "No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

"(a) Ceasing or refusing to perform any work or to remain in any relation of employment; . . . ." 29 U.S.C. § 104.

5. 398 U.S. at 253.

tration of labor disputes will in no way be undermined if the injunction requested here is denied.

In *Boys Markets* the strike was designed to pressure the Company into capitulating on the arbitrable issue before it could present its position to the arbitrator. In the present case, no similar situation exists. It is true that here, as in *Boys Markets*, there is a dispute that is clearly arbitrable—that is, the dispute over the nature of the Local 110 picket line and hence the legality of the Local 926 work stoppage. However, in this case, unlike *Boys Markets, the union's work stoppage is not designed to force settlement of this arbitrable issue before arbitration can take place; it is not an attempt to defeat the arbitrator's jurisdiction.*

We can state this conclusion without equivocation because of the undisputed facts in this case. Local 926 engaged in its work stoppage only because of the presence of Local 110's picket line. The work stoppage was not begun, nor was it continued, because of the union's disagreement with the Company over the arbitrable issue; that is, over its right to engage in a work stoppage. As a result, no concession that the Company could have made on this issue would have helped to end the walkout. That goal could be attained by the Company only if it resolved its dispute with Local 110 and thus caused that union to remove its picket line.

Since this is true, the work stoppage could have exerted no pressure upon the Company to give up its fight on the arbitrable issue and forego arbitration since resolution of the arbitrable dispute prior to arbitration would have brought nothing in return; the work stoppage would have continued in any event. Thus, the work stoppage placed no pressure on the Company to forego arbitration.[6]

6. If Local 926, after walking out in recognition of the Local 110 picket line, had said that the men would not return until the pickets were removed, *and also until the Company recognized their right to honor that picket line* under the collective bargaining agreement, then the situation would be different. Under these facts, it could fairly be said that the union was trying to prevail on the merits of the arbitrable issue by employing economic force rather than by employing reasoned arguments before a neutral arbitrator, and the work

This fact makes the policy considerations operative here crucially different from those that were present in *Boys Markets*. In that case, the Court enjoined a strike that was specifically undertaken in order to force a resolution to the arbitrable dispute and therefore to circumvent arbitration; here, the work stoppage exerted no pressure on the Company to resolve the arbitrable issue short of arbitration.[7] As a result, while in *Boys Markets* the strike deterred the employer from pursuing arbitration, thus making it necessary to enjoin the strike in order to promote the policy favoring arbitration, no similar situation exists here. In this case, since the work stoppage does not pressure the Company to forego arbitration, the issuance of a *Boys Markets* injunction will do nothing to promote the arbitration of labor disputes, and its issuance cannot be supported by the policy considerations that underlie *Boys Markets*.

However, one might object that while the factors we discuss above make it clear that the issuance of an injunction in this case will not promote arbitration in the same

---

6. (Cont'd)

stoppage would then be an effort to resolve the merits of the dispute in a way that rendered the arbitrator's jurisdiction ineffective. At that point, we would be in the true *Boys Markets* situation and, under the holding of that case, the issuance of an injunction would be sustainable. However, as we note in the text, the facts of the present case are otherwise.

7. One might object to this blanket statement by arguing that the work stoppage does discourage arbitration, indirectly, by pressuring the Company to settle its dispute with Local 110. If the company did, in fact, give in to this pressure, the pickets would be removed, the work stoppage would end, and resolution of the primary-secondary dispute would become totally irrelevant, thereby defeating the arbitrator's jurisdiction.

The fallacy in this argument lies in the assumption that resolution of the Company-Local 110 dispute would make an arbitrator's decision in the primary-secondary issue superfluous. This assumption is wrong for two reasons. First, the company, if correct on the merits, would still have a cause of action for the damages against Local 926, and would need the arbitrator's decision in order to pursue it. Second, if the Company wished to discipline or discharge any of the employees who engaged in the work stoppage the issue of its legality would also have to be arbitrated.

In the true *Boys Markets* situation the employer would not be free to pursue arbitration for these reasons since he would have already conceded on the arbitrable issue. Thus, his continued pursuit of arbitration would amount to a renunciation of his concession of the arbitrable dispute and would invite a renewal of the work stoppage.

way that it was promoted by the injunction in *Boys Markets*, the majority's decision might still promote that goal by other means. We do not think that this suggestion can withstand analysis. In fact, in our opinion, the overall effect of the majority's decision is to actually *discourage* the arbitration of labor dispute.

If no injunction is permitted in this case, employers who in the future are placed in the situation faced by NAPA Pittsburgh will have every reason to seek arbitration since they will be able to end the work stoppage only by prevailing on the merits. However, if we affirm the district court and allow it to enjoin the work stoppage pending arbitration, employers in future cases will have everything to lose and nothing to gain from arbitration. Thus, we will be giving them every incentive to avoid and obstruct arbitration by every means at their disposal.

This unfortunate effect will occur because of the peculiarly limited role that the court plays in a case such as this. The district courts cannot look at the merits of these disputes since that is the province of the arbitrator. All they can do is review the circumstances of the case to see if an arbitrable issue exists and issue an injunction if the requirements of *Boys Markets* are met. As a result, the majority's interpretation of the *Boys Markets* holding creates a situation where an employer can end any work stoppage simply by going to the district court and *alleging* that under the terms of the collective bargaining agreement the work stoppage itself is illegal.[8]

The advantage that an employer enjoys in initiating this sort of proceeding, instead of pursuing arbitration of the merits is apparent. In arbitration he runs the risk of losing on the merits; before the district court no such risk exists since the merits are never reached. Thus, we can safely assume that employers who in the future are faced

8. Since issues arising out of differing interpretations of the terms of the collective bargaining agreement are arbitrable under most arbitration clauses, these allegations will be sufficient to elicit an injunction ending the work stoppage.

with work stoppages similar to the one that faced the company in this case, will seek their initial relief in federal court rather than through arbitration.

Moreover, once the district court has issued its injunction, the employer will have everything he seeks, since the work stoppage will have been ended. As a result, he will no longer have anything to gain from arbitration.[9] On the other hand, arbitration might conceivably be very costly to him, since once the merits of the issue are reached, he will always run some risk of losing and a defeat on the merits would cause the injunction to lapse, raising the possibility of a renewal of the work stoppage. Thus, a rational employer will not only avoid initiating arbitration, he will use every means at his disposal to delay it as long as possible.

We think it is clear that a rule that gives one party every incentive for avoiding the arbitration will inhibit the smooth functioning of that procedure. As a result, it is our conclusion that the majority's opinion, rather than promoting the arbitration of labor disputes, will actually tend to discourage it.

We can see two objections that might be raised in an attempt to refute this conclusion. The first would concede that the issuance of an injunction here would discourage future employers from seeking or submitting to arbitration, but argues that the opposite result would only encourage equal recalcitrance on the part of the union. If this is true, it would obviously eliminate the negative policy impact we have outlined above. The second objection is raised by the majority and it also concedes (at least, by implication) that the issuance of an injunction will make obstruction of arbitration useful from the employer's point of view. However, this argument then suggests that undue delay can be con-

---

9. It is true that the company may eventually need a favorable decision on the merits if it wants to sue the union for the damage caused during the pre-injunction period when the strike was still in progress. However, since these damages can be collected many months after the event, the company can delay arbitration to the maximum extent possible and still not jeopardize its right to monetary relief.

trolled by the district court through the use of its equitable powers.[10]

We do not believe that either of these arguments can withstand close scrutiny. With regard to the first, we think it is clear that the refusal to permit the issuance of an injunction in factual situations such as this would not place the union in a situation similar to that faced by the employer when an injunction can issue. As we have seen, if an injunction is issued, employers are given every reason to avoid and delay arbitration. However, if no injunction is issued, the union does not have the same incentive to seek delay for it will ultimately be liable in damages if it is, in fact, engaged in an illegal work stoppage. Thus, while obstruction and delay of the arbitration proceeding might permit the union to continue an illegal work stoppage for some period of time, this gain will only come at a significant cost since it would increase the union's monetary liability to the same extent.

As far as the second argument is concerned, it is true that the district court can use its equitable powers to seek to control undue delay. However, we do not feel that there is any reasonable way that a district court can use this power to prevent significant delay when that goal is sought by one of the parties.

In this case, for example, the employer can delay arbitration for nine days simply by using all of the time that is allotted to it at each step in the grievance procedures that leads to arbitration.[11] Moreover, this nine day figure does

---

10. As the majority opinion puts it, "Undue delay should not be permitted since the district court has ample authority in the exercise of its equitable powers to see to it that arbitration proceeds promptly and expeditiously."

11. The relevant Article of the collective bargaining agreement reads as follows:

"Article XI—Grievance Procedure

"Any and all grievances, complaints or disputes arising between the Employer and the Union or any employee represented by the Union and covered by this Agreement shall be settled in the following manner:

"FIRST: All complaints or grievances shall be in writing and be filed by the grieving party within 48 hours, and shall be taken up by the Steward and the Employer or Representative of the Employer in the first

not include the time that it will take for the Board established by the "Third" paragraph to deliberate on the matter, nor does it include the time needed (under the "Fourth" paragraph) to choose a neutral arbitrator, to bring the arbitration panel together, and to have the panel hear and decide the dispute. Obviously, these steps will use additional time in any event, and also provide a determined employer with further opportunities for stretching out the time needed to complete arbitration.

As a result, the employer will be able to delay the arbitration proceedings for at least several weeks, and throughout this period, the work stoppage will be enjoined. Since strikes like the present one are a response to specific disputes over which the union has no control, they are highly dependent upon timing for their success, and a minimum delay of this magnitude will render many of them ineffective. Thus, the incentive for the delay of arbitration by the employers, that is created by the issuance of an in-

---

11. (Cont'd.)
instance and they shall endeavor to arrive at a settlement of the dispute within 48 hours.

"SECOND: Failing to agree, the shop Steward shall report the matter to the Union and the Union shall submit it in writing within three (3) days and attempt to adjust the same with the Employer within three (3) days.

"THIRD: Upon failure to agree and upon request of either the Union or the Employer, the matter shall be submitted within 48 hours to a Board made up of two (2) representatives selected by each party for the purposes of hearing and attempting to adjust the matter.

"FOURTH: In the event the matter cannot be adjusted by the method set forth above, or in case of any other disputes arising under this contract pertaining to its meaning or application, each party shall forthwith name one (1) arbitrator and the two (2) so chosen shall within forty-eight (48) hours name a neutral arbitrator. If the two do not agree upon a neutral arbitrator within 48 hours, the Director of the U.S. Mediation and Conciliation Service shall be requested to name a panel of five (5) suggested neutral arbitrators. The arbitrators named by the parties will then select the neutral arbitrator from such panel by each eliminating two of the arbitrators on the suggested panel submitted by the Director of the U.S. Mediation and Conciliation Service. The expense of the neutral, if any, shall be shared equally by the parties. Each party agrees to accept and abide by an award made by the majority of the Arbitration Board so constituted.

"FIFTH: There shall be no cessation of work during the pendency of the grievance proceedings."

junction in this case, cannot be effectively controlled by the district court's equitable powers.

Our conclusion therefore is that the Local 926 work stoppage did not have a negative impact, overall, on the goal of promoting the arbitration of labor disputes and that as a result the policies considerations that led to the creation of the *Boys Markets* rule do not support the issuance of an injunction in this case.

II. The Holding in Boys Markets

While our analysis of the policy considerations underlying *Boys Markets* leads us to the conclusion that an injunction should not issue in this case, we must still deal with the suggestion, implicit in the majority's holding, that the rule created in that case encompasses the factual situation presented here. If this is true, then policy considerations notwithstanding, the issuance of an injunction was permissible.

The majority characterizes the *Boys Markets* holding as follows:

> "[Boys Markets] holds in essence that where a matter has been made arbitrable by the terms of a contract between the union and the company, an injunction may be issued to enforce this method of settling controversies between the parties."

If these words are meant literally then the majority has misapplied its own rule under the facts presented here. Both parties agree that the "primary-secondary" issue is arbitrable and, as explained above, the union never tried to short circuit arbitration of that dispute by means of the work stoppage. As a result, there was no need to issue an injunction to "enforce this method of settling controversies between the parties," since there was never an attempt by the union to resolve the only arbitrable dispute by any other means.

However, since the majority affirms the issuance of the injunction, we assume that it reads the *Boys Markets* rule to permit the issuance of an injunction whenever arbitration might ultimately have the effect of ending a work stoppage.[12] We cannot agree with this expansive reading of the case. Not only does it run counter to the policy considerations that underlie the *Boys Markets* decision, it also ignores the language that carefully limits its holding.

As we noted earlier, in *Boys Markets* a dispute arose over the right of union employees to perform certain tasks at the employer's store and the union called a strike in an effort to force the Company to capitulate on that issue, despite the fact that it had agreed to seek resolution of this kind of dispute through the use of arbitration, rather than by means of a strike. Under these facts the Court held that since the strike was "*over* a grievance which both parties are contractually bound to arbitrate," 398 U.S. at 254 (emphasis added), an exception to the board anti-injunction provisions of the Norris-LaGuardia Act was appropriate and an injunction could issue. In addition, it carefully spelled out the circumstances under which such an injunction could issue and emphasized the limited nature of its decision by stating that, "[o]ur holding in the present case is a narrow one. We do not undermine the vitality of the Norris-LaGuardia Act." 398 U. S. at 253.

In our opinion, the import of this careful language is clear. An injunction can be issued to end a work stoppage only when an arbitrable issue is itself the "underlying cause" of the strike.[13] We reach this conclusion for three reasons. First, the Court in *Boys Markets* specified that a

12. Here, arbitration would have ended the work stoppage if the company had prevailed on the merits of the dispute. However, if the union had prevailed on the merits then arbitration would have had no effect on the work stoppage.

13. As this Court stated in *Parade Publications, Inc. v. Philadelphia*, 459 F.2d 369 (3d Cir. 1972):

> "We read [Boys Markets] to indicate that arbitration should be encouraged by permitting judicial enforcement of a 'no strike' clause when the *underlying issue* is arbitrable but that there should be no injunction if the underlying dispute is not arbitrable." *Id.* at 374 (emphasis added.)

strike must be "over" an arbitrable dispute if it is to be enjoinable, and in our opinion a strike cannot be described as "over" a dispute unless that dispute is a cause of the work stoppage. Second, the *Boys Markets* decision is, by its own description a "narrow" one. Therefore it should logically be limited by the key factual circumstances that were present in the case. As a result, since the arbitrable dispute in *Boys Markets* (over the right of the union employees to perform the tasks involved) was also the underlying cause of the strike, this is logically a required part of the rule.

Finally, and of greatest significance, we reach this conclusion because, as we discussed at length in Part I of this opinion, a broader reading of the *Boys Markets* holding would extend it into areas where the policy considerations that dictated that decision simply do not operate. If the arbitrable dispute is not a "cause" of the work stoppage, then a concession on that dispute by the employer will not help to end the work stoppage. Under these circumstances, the work stoppage will exert no pressure on the employer to resolve the arbitrable issue short of arbitration. Thus, if this basic cause-effect relationship between arbitrable issue and the strike is not present, the strike will not discourage arbitration and the policy that favors the arbitration of labor disputes will not be furthered by the issuance of an injunction.

Applying this rule to the facts of the present case, it is clear that an injunction should not have issued. Here, the dispute that was the sole underlying cause of the Local 926 work stoppage was the fight between the Company and Local 110 that led to the creation of that union's picket line. This issue was plainly not arbitrable under Company-Local 926 collective bargaining agreement since it did not involve Local 926. Thus, though it caused the strike it provided no reason for the issuance of a *Boys Markets* injunction.

On the other hand, the dispute as to the nature of the Local 110 picket line and thus as to the legality of the Local

926 work stoppage was arbitrable. However, this dispute was never an "underlying cause" of the Local 926 work stoppage since it arose after that work stoppage had begun and never became a basis for its continuation. As a result, the strike never deterred the arbitration of this issue and the existence of this dispute never provided a basis for the issuance of an injunction under the holding in *Boys Markets*.[14]

Before we close our discussion of the holding in *Boys Markets*, we must finally discuss its relationship to *Gateway*

14. We note that our interpretation of the scope of the *Boys Markets* decision and our conclusion that a *Boys Markets* injunction should not issue here finds direct support in cases that have been decided by the Fifth Circuit and several district courts on facts almost identical to those presented here. *Amstar Corp. v. Amalgamated Meat Cutters*, 468 F.2d 1372 (5th Cir. 1972); *see, e.g., General Cable Corp. v. Int'l Bhd of Elec. Workers*, 331 F. Supp. 478 (S. Md. 1971); *Simplex Wire and Cable Co. v. Local 2208, Int'l Bhd of Elec. Workers*, 314 F. Supp. 885 (D. N.H. 1970); *but see Monongahela Power Co. v. Local 2332, Electrical Workers*, 484 F.2d 1209 (4th Cir. 1973).

The majority seeks to distinguish this precedent by stating that, "[i]n none of the cited cases was there a contractual provision restricting the union's right to honor picket lines of other labor organizations." However, we are constrained to note that the majority, in its attempt to distinguish these cases, has seized upon a factual difference that in no way supports its implicit conclusion that a *Boys Markets* injunction could be properly denied in the cited cases and still be issued here. In fact, the only conclusion that can sensibly be drawn on the basis of the factual difference noted by the majority is that if a *Boys Markets* injunction should be issued to end the strike here, then there is an even *stronger* reason for concluding that a *Boys Markets* injunction should have been issued in the cited cases.

It is true, as the majority notes, that the collective bargaining agreement in this case contains a clause that was not contained in the agreements that were in operation in the cited cases. However, to characterize this additional clause as a restriction on the union's right to strike is misleading. Article XIII of the Company-Local 926 collective bargaining agreement does not *restrict* appellant's right to strike. Instead, it *enlarges* that right by creating an exception to the agreement's apparently all inclusive no-strike language. See the "Fifth" paragraph of Article XI, note 12, *supra*. This intent to "enlarge" the union's right to strike is apparent from the language of Article XIII itself:

> "It *shall not be a violation* of this Agreement . . . in the event an employee . . . refused to go through or work behind any primary picket lines at the Employer's place or places of business." (Emphasis added).

In the cases cited, it is true that the agreements contained no clause similar to Article XIII. However, the agreement in each of these cases, like the agreement here, did contain an apparently all inclusive no-strike pledge. As a result, each of the unions in the cited precedent apparently had no right to strike at all, while in this case the union retained a limited right to strike that was arguably applicable under the facts of the case. Thus, the argument in favor of issuing a *Boys Markets* injunction to end the strike was stronger in the cited cases than it is in this case, and their denial of injunctive relief is *a fortiori*, in point here.

Coal Co. v. United Mine Workers, 414 U.S. 368 (1974). While the majority never articulates the point, we believe that it is influenced by an unstated feeling that *Gateway Coal* has somehow expanded the *Boys Markets* exception to the anti-injunction provisions of the Norris-LaGuardia Act in a way that is relevant here.

We do not believe that a careful reading of that opinion can support this conclusion. In *Gateway Coal*, a strike occurred because the employer attempted to reinstate two suspended foremen who the union felt would pose a safety hazard if allowed to resume their normal responsibilities.[15] The employer responded by seeking a *Boys Markets* injunction.

The right to obtain such an injunction in that case revolved around three key issues that were ultimately settled by the Supreme Court: 1) whether the issue in dispute was truly arbitrable; 2) whether the arbitration clause in the collective bargaining agreement gave rise to an implied no-strike obligation; and 3) whether the circumstances in the case satisfied the traditional equitable considerations that must also be met before a *Boys Markets* injunction can be issued. The Court answered each question affirmatively and concluded that a *Boys Markets* injunction should issue.

The first thing that should be noted is that in *Gateway Coal* the undisputed facts clearly established that the strike was caused by the "arbitrable" dispute over the work status of the two foremen. Thus, since the "underlying cause" requirement of *Boys Markets* was clearly satisfied, that case could not have *held* that that element was no longer a prerequisite to the issuance of a *Boys Markets* injunction.

Second, we can find nothing in the Court's discussion of the issues that were raised in *Gateway Coal* that would suggest that at some point in the future it is likely to hold

15. These foremen had been suspended from their jobs because they had neglected to make a safety check they were responsible for making and, as a result, had unnecessarily subjected the men to a dangerous condition.

that the "underlying cause" requirement of *Boys Markets* is no longer operative. As we have noted, this requirement was established in order to limit the availability of *Boys Markets* injunction to those cases in which the work stoppage has the effect of undercutting the arbitration of labor disputes. As a result, as long as the promotion of the arbitration of labor disputes remains the policy rationale that justifies the issuance of *Boys Markets* injunctions, the "underlying cause" requirement will logically remain an integral part of the rule.

We can find nothing in the *Gateway Coal* decision that suggests that this policy goal has been or will be changed. The Court's discussion of the arbitrability of the safety dispute involved in the case, and its discussion of the traditional requirements of equity deal with the existence of additional factors that are plainly required before an injunction can issue under the holding in *Boys Markets*. Its conclusion that these prerequisites were met can support no inference that the underlying policy rationale of the *Boys Markets* rule has been changed or expanded.

The rest of the opinion addresses itself to the question of whether the union's agreement to arbitrate the dispute must be reinforced by an explicit agreement not to strike in order for a *Boys Markets* injunction to issue. The Court concludes that an explicit no-strike clause is not needed since the agreement to arbitrate a dispute implies, in the normal case, a corresponding agreement not to seek its resolution through a strike.

It is true that this part of the *Gateway Coal* opinion does expand the *Boys Markets* holding, since it permits courts to enjoin strikes in the absence of explicit no-strike agreements. However, this extension of the rule in no way changes the policy rationale of *Boys Markets*. On the contrary, it only provides for its logical extension since it allows the district courts to enjoin strikes that undercut agreed upon arbitration regardless of whether those strikes

are also explicitly barred by the terms of the collective bargaining agreement.

As a result, nothing in *Gateway Coal* in any way suggests a change in the underlying policy rationale that justifies the *Boys Markets* rule. It is still designed to end strikes if, but only if, they have the effect of undercutting agreed upon arbitration. Since this is true, we can only assume that the "underlying cause" requirement will remain a necessary prerequisite to the issuance of a *Boys Markets* injunction.

III. Conclusion

As we stated at the outset, our disagreement with the majority boils down to a dispute as to the meaning of *Boys Markets*. In our opinion, the holding in that case permits the issuance of injunctions to end work stoppage only when an arbitrable dispute is an underlying cause of the strike.

We reach this conclusion, in part, because of the language used to state the holding in that case. However, we are primarily persuaded by our understanding of the policy considerations that underlie that decision. In *Boys Markets* the court was faced with a dilemma. On the one hand, it was obliged to give effect to the policy judgment that is embodied in the anti-injunctions provisions of the Norris-LaGuardia Act by refusing to issue an injunction. On the other, it was equally obliged to enjoin the strike since its clear effect was to undercut the policy that favors the promotion of arbitration of labor disputes. Under these special circumstances, it ruled that an injunction could issue.

It is important to note that the Court's goal was not to end the strike.[16] Instead, its sole purpose was to promote the arbitration of the labor dispute involved by eliminating a serious impediment to that goal. Thus, its rule sensibly permits the enjoining of strikes only when they

16 Indeed, it did this most reluctantly in view of the anti-injunctions provisions of the Norris-LaGuardia Act.

have the effect of interfering with agreed upon arbitration. As we have noted, a strike can have this effect only when it is caused by the dispute that is supposed to be arbitrated, since only under those circumstances will the strike pressure the employer to capitulate on the arbitrable dispute and therefore forego its arbitration.

Once this "underlying cause" requirement is accepted as an integral part of the *Boys Markets* rule, its application to the facts of this case is mechanical. Here, the underlying cause of the strike was not arbitrable (and the only dispute that was arbitrable was not a cause of the work stoppage). Thus, the work stoppage was not an attempt to force the company to capitulate on the arbitrable dispute and forego arbitration, and the district court erred in enjoining the work stoppage.

ADAMS, Circuit Judge, dissenting:

Judge Hunter's thoughtful and comprehensive opinion reflects to a large extent my own views with respect to the issues presented by this appeal. However, although Judge Hunter, in discussing Boys Markets, Inc. v. Retail Clerks Local 770,[1] does advert to the fundamental jurisprudential principle that courts are to interpret Laws and to permit policy considerations to infect their decisions only within statutory interstices, he does not appear to accord that principle the same weight I would in reaching a conclusion that a *Boys Markets* injunction is not appropriate in the circumstances here.

Analysis of the scope of the *Boys Markets* decision must encompass an appreciation of the widespread abhorrence of the labor injunction that existed at the time of the enactment of the Norris-LaGuardia Act.[2] Many viewed the injunction as the principle weapon of those antagonistic to

1. 398 U.S. 235 (1970).

2. *See generally* Frankfurter & Green, The Labor Injunction (1930).

the emerging labor movement. Some courts, it was felt, employed the injunction to effectuate their own policy predilections, predilections that did not attach substantial significance to the interests of the working man. In response to these sentiments, Congress enacted the Norris-LaGuardia Act. The Act expressly deprived the federal courts of jurisdiction to issue labor injunctions in almost all circumstances.[3]

Subsequent developments, however, seemed to temper somewhat the posture of judicial abstention imposed by the Norris-LaGuardia Act. In 1947, Congress enacted Section 301(a) of the Labor-Management Relations Act which, by its terms, permits suits for violations of collective bargaining agreements to be brought in federal courts. In Textile Workers Union v. Lincoln Mills,[4] the Supreme Court, in reversing the district court's refusal to compel the employer to arbitrate pursuant to the collective bargaining agreement, held that Section 301(a) calls upon the federal courts to fashion a federal substantive labor law.

Lincoln Mills and the *Steelworkers Trilogy*,[5] which followed three years later, made it apparent that the cornerstone of this judge-made labor law was to be a policy favoring the operation of the arbitral process in resolving labor-management disputes. Inevitably the Supreme Court was faced with the request of an employer, relying on this federal policy favoring arbitration, to enjoin a strike over an arbitrable grievance. The union, of course, interposed the express prohibition against such an injunction contained in the Norris-LaGuardia Act. In 1962, the Court, in Sinclair Refining Co. v. Atkinson,[6] held that the Act precluded the issuance of the injunction.

---

3. *Cf.* United States v. UMW, 330 U.S. 258 (1947).

4. 353 U.S. 448 (1957).

5. United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574 (1960); United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

6. 370 U.S. 195 (1962).

But eight years later, in *Boys Markets*, the Supreme Court reconsidered *Sinclair*. This reconsideration was prompted in part by the "anomalous" situation created when some employers seeking injunctive relief in state courts, which were not subject to limitations like those of the Norris-LaGuardia Act,[7] were frustrated in their attempts by the unions' removal of the cases to federal courts. Such federal courts proceeded to vacate the state court injunctions on the basis of the Act. The Court overruled *Sinclair* and, as Judge Hunter notes, made a "narrow" exception to the Norris-LaGuardia Act. In so doing, the Court "accommodated" the Act to the federal policy favoring arbitration by permitting an injunction in the carefully circumscribed situation that exists when a work stoppage is over an arbitrable grievance. The Court, nevertheless, emphasized that with its opinion in *Boys Markets* it did "not undermine the vitality of the Norris-LaGuardia Act."[8]

In light of this historical backdrop, it is necessary to approach cases appearing to hover near the parameters of the *Boys Markets* exception to the Norris-LaGuardia Act with an understanding that *Boys Markets* itself may represent the judiciary's most ambitious foray into an area seemingly pre-empted by statute. Absent a clear signal from the Supreme Court, doubts should be resolved in favor of the applicability of the Norris-LaGuardia Act. When viewed from this perspective, Judge Hunter's analysis is, in my judgment, particularly persuasive.

It may be suggested that Gateway Coal Co. v. United Mine Workers[9] constitutes a direction by the Supreme Court for federal courts to exercise less circumspection than the language of *Boys Markets* would seem to indicate in

7. At the time of *Boys Markets*, "about one-half of the states [had] enacted so-called 'little Norris-LaGuardia Acts' . . . ." However, "in only about 14 jurisdictions [was] there a significant Norris-LaGuardia-type prohibition against equitable remedies for breach of no-strike obligations." 389 U.S. at 247-48 n.15.

8. 398 U.S. at 253.

9. 414 U.S. 368 (1974).

issuing injunctions in circumstances such as those here. The basis of such a suggestion, so the argument seems to go, is the Court's willingness to imply a no-strike obligation when the collective bargaining agreement did not contain an *express* no-strike provision. However, in Teamsters Local 174 v. Lucas Flour Company,[10] a damage action, the Supreme Court, eight years prior to *Boys Markets*, implied a no-strike clause coextensive with the arbitration provision. Therefore, in light of the well-established *Lucas Flour* precedent, the implication of a no-strike clause in the context of a suit to secure a *Boys Markets* injunction was not particularly surprising, and, therefore, cannot be said to amount to a signal to relax the rather strict preconditions placed on the issuance of a labor injunction by the *Boys Markets* decision and set out with specificity by Justice Brennan.[11]

Accordingly, for the reasons so well expressed by Judge Hunter plus those set forth above, I respectfully dissent.

---

10. 369 U.S. 95 (1962).

11. 398 U.S. 253-55.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

(A.O.—U. S. Courts, International Printing Co., Phila., Pa.)

TABLE OF CONTENTS

	Page
PROCEEDINGS BELOW	2
A. PROCEEDINGS IN THE DISTRICT COURT	2
B. PROCEEDINGS IN THE COURT OF APPEALS	2
C. SUBSEQUENT PROCEEDINGS	3
REASONS FOR DENYING THE WRIT	3
CONCLUSION	10

INDEX OF CITATIONS

CASES:	Page
Amstar Corp. v. Amalgamated Meat Cutters & B. Workmen, 468 F.2d 1372 (5th Cir. 1972)	5, 6, 7, 8
Boys Market v. Retail Clerks, 398 U.S. 235 (1970)	2, 3, 4, 6, 9
Gateway Coal Co. v. Mine Workers, 414 U.S. 368 (1974)	9
Monongahela Power Co. v. Local 2332, International Brotherhood of Electrical Workers AFL-CIO-CLC, 484 F.2d 1209 (4th Cir. 1973)	8
NAPA Pittsburgh, Inc. v. Automotive Chauffeurs, Parts and Garage Employees, Local Union 926, Civ. No. 73-764 (3rd Cir., filed August 8, 1974)	5
Parade Publications, Inc. v. Philadelphia Mailers Union No. 14, 459 F.2d 369 (3rd Cir. 1972)	5
STATUTES:	
29 U.S.C. Section 185	2, 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-48

LOCAL 391, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, ET AL., *Petitioners*

v.

PILOT FREIGHT CARRIERS, INC., *Respondent*

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Respondent, Pilot Freight Carriers, Inc., respectfully prays that petitioners' "Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit" be denied.

PROCEEDINGS BELOW[1]

A. Proceedings in the District Court

Pilot instituted this action against Local 391 and International for injunctive relief to terminate a work stoppage at its terminal and for damages for breach of contract under Section 301 L.M.R.A. (29 U.S.C. Section 185). The District Court concluded that it had jurisdiction pursuant to 29 U.S.C. Section 185, and held that "the dispute or controversy between the parties involving the refusal of those Pilot employees who are members of Local 391 to cross a picket line at Pilot's terminals is a matter subject to the mandatory grievance procedures of the parties' contract, and thus this Court has authority under *Boys Markets* to issue an injunction." The District Court issued a preliminary injunction "pending . . . a valid and proper exhaustion of contractual remedies."

B. Proceedings in the Court of Appeals

The petitioners appealed and sought, and obtained, a stay of the injunction pending appeal. On May 3, 1974, the Fourth Circuit reinstated the preliminary injunction insofar as it applied to International and Local 391. The Court of Appeals reasoned that:

> "The National Master Freight Agreement in the present case does have a mandatory grievance procedure (Article 8) regarding any dispute under the contract. The relationship between the no-strike clause and the clause allowing individual employees to refuse crossing a primary picket line was, we think, an arbitrable matter, as is Pilot's contention

---

[1] Unless otherwise stated, page references are to the Appendix of *petitioners'* petition.

that the underlying dispute, whether the local union or national union had directed or influenced concerted activity not to cross the picket line, as opposed to individual employees' decisions not to cross it. On the merits, the arbitration must decide whether Article 9, whatever its scope is found to be, had been complied with or whether the union is using Article 9 as a subterfuge to strike in violation of the argeement. We think the parties intended to submit disputes of this nature to arbitration, and, in any event, we must construe the agreement liberally in favor of arbitration. *United Steelworkers of America v. Warrior and Gulf Navigation Co.*, 363 U.S. 564 (1960)." (p. 29 a.)

C. Subsequent Proceedings

This Court denied the Application of International and Local 391 "For Stay of Mandate of United States Court of Appeals for the Fourth Circuit."

The District Court, in a Memorandum Order dated May 30, 1974, concluded that by virtue of proceedings subsequent to the entry of the order of the Court of Appeals of May 3, 1974, "the mandatory grievance machinery of the various contracts (had) been exhausted" and dissolved the preliminary injunction.

REASONS FOR DENYING THE PETITION

The decision of the Fourth Circuit in this case does not erroneously construe *Boys Markets v. Retail Clerks*, 398 U.S. 235. Furthermore, it is not in direct conflict with decisions of the Third and Fifth Circuits as contended by petitioners. As discussed below, the Third Circuit has in fact recently expressed its approval of the decision of the Fourth Circuit in this case. Peti-

tioners have failed to set forth "special and important reasons" why this Court should review the decision of the Fourth Circuit in this case on writ of certiorari. The petition should be denied.

All of the prerequisites for the issuance of a *Boys Markets* injunction were found to exist in this case. (Decision of District Court, p. 9a; Decision of Fourth Circuit, p. 29a). The Court below easily found that in light of the broad mandatory grievance procedure covering "[a]ll grievances or questions of interpretation" and the express no-strike clause prohibiting all strikes, that the work stoppage herein was over matters that both parties were contractually bound to arbitrate. The Court of Appeals succinctly stated:

> "The National Master Freight Agreement in the present case does have a mandatory grievance procedure (Article 8) regarding any dispute under the contract. The relationship between the no-strike clause and the clause allowing individual employees to refuse crossing a primary picket line (Article 9) was, we think, an arbitrable matter, as is Pilot's contention that the underlying dispute, whether the local union or national union had directed or influenced concerted activity not to cross the picket line, as opposed to individual employees' decisions not to cross it. On the merits, the arbitration must decide whether Article 9, whatever its scope is found to be, had been complied with or whether the union is using Article 9 as a subterfuge to strike in violation of the agreement. We think the parties intended to submit disputes of this nature to arbitration, and, in any event, we must construe the agreement liberally in favor of arbitration. *United Steelworkers of America v. Warrior and Gulf Navi-*

gation Co., 365 U.S. 564 (1960). (p. 29a, see also the decision of the District Court, p. 9a)."

Petitioners erroneously contend the decision of the Fourth Circuit is in direct conflict with the decision of the Third Circuit in *Parade Publications, Inc. v. Philadelphia Mailer U. No. 14,* 459 F.2d 369 (3rd Cir. 1972) (hereinafter "*Parade*") and the decision of the Fifth Circuit in *Amstar Corp. v. Amalgamated Meat Cutters and B. Workmen,* 468 F.2d 1372 (5th Cir. 1972) (hereinafter "*Amstar*").

The case *sub judice* does not conflict with *Parade.* In *Parade* the employer did not affirmatively allege that an arbitrable issue was involved in the work stoppage. *Parade* merely held that a district court has no jurisdiction to issue a *Boys Markets* injunction if it does not first determine that the grievance in question is arbitrable under an existing collective bargaining agreement. The district court in *Parade* failed to determine what caused the strike and whether any arbitrable issues existed. The Court of Appeals remanded the case to the district court to hear evidence and determine these issues. In the case *sub judice* it has been firmly established that underlying arbitrable issues do exist.

In reality, the Third Circuit follows the Fourth Circuit, as evidenced by *NAPA Pittsburgh, Inc. v. Automotive Chauffeurs, Parts and Garage Employees, Local Union 926,* Civ. No. 73-764 (3rd Cir. filed August 8, 1974), (hereinafter "*NAPA*"). In *NAPA,* Teamsters Local 110 (Local 110) called a strike at NAPA Altoona, Inc.'s, Altoona facility and began picketing. Subsequently picket lines were established at NAPA Pittsburgh, Inc.'s facility in Pittsburgh. Relying on a provision in the collective bargaining agreement per-

mitting employees to refuse to cross "primary" picket lines at NAPA Pittsburgh, Inc.'s place of business, Automobile Local 926, (Local 926), the bargaining agent for the employees of NAPA Pittsburgh, Inc., informed its members that notwithstanding the express no-strike clause and broad mandatory grievance procedures of the collective bargaining agreement, they could refuse to cross Local 110's picket line at the Pittsburgh plant. A work stoppage ensued and NAPA Pittsburgh sought injunctive relief on the ground that a question existed as to whether the picket line was "primary" within the meaning of the collective bargaining agreement, and contended the issue was subject to the mandatory arbitration provisions of the collective bargaining agreement. The Court of Appeals held that a *Boys Market* injunction was proper pending arbitration of the question whether the picket line was "primary":

> "We hold that determination of whether the picket line should be classified as primary or secondary was arbitrable under the terms of the contract and pending resolution of the question Local 926 was properly enjoined from causing a work cessation. Requiring arbitration does not nullify the union's right to honor a primary picket line, but only suspends the exercise of the right until its existence is established by an arbitrator's decision. Undue delay should not be permitted since the district court has ample authority in the exercise of its equitable powers to see to it that arbitration proceeds promptly and expeditiously." (P. 6, Appendix, Supplement to Petition.)

The Fifth Circuit's decision in *Amstar* is not directly in conflict with the decision of the Fourth Circuit in this case. In *Amstar*, unlike this case and *NAPA, supra*, the

contract contained no clause relative to the right of employees to honor picket lines of other labor organizations. In this case, as in *NAPA*, the contract expressly provided that employees could honor only "primary" picket lines. Consequently, the only arbitrable issue found to exist in *Amstar* between the employer and the Meat Cutters Union was the scope of the no-strike clause, or more particularly, the validity under the Meat Cutters' no-strike obligation of the member-employees at the Chalmette refinery honoring the picket lines of striking independent unions from other cities (local unions affiliated with the International Longshoremen's Association). Unlike this case and *NAPA*, no one in *Amstar* contended that the establishment of the picket line immediately raised a dispute, and thus an arbitrable issue, as to whether the picket line was primary (and could be honored) or secondary (and could not be honored). Even under the restrictive *Amstar* view, the work stoppage in this case is "over" an underlying arbitrable dispute. As soon as the picket lines were established at Pilot's Kernersville terminal (and before the work stoppage fully developed) a dispute arose between the parties as to whether or not the picket line was secondary or primary and whether the picket line was actually that of Local 512. This alone should distinguish this case from *Amstar*. The dispute in this case is highlighted by the fact that, unlike the picket line in *Amstar*, the roving picket lines at Pilot's terminals were not picket lines of independent unions but rather were established either by Local 512, an affiliate of International and a sister union of Local 391, or else by International itself, acting in concert with Local 391 and other locals.

The close affiliation between Local 512 and International and Local 391 raised a further arbitrable issue

not present in *Amstar* or *NAPA*.[1] In the words of the Fourth Circuit, that issue was "whether Article 9 had been complied with or whether the union is using Article 9 as a subterfuge to strike in violation of the agreement."

It is clear that the no-strike clause (Article 44) would prohibit International and Local 391 from calling a system-wide strike to force Pilot to recognize Local 512 as the bargaining agent for the Florida employe . It is equally clear that they should not be permitted to use alleged Article 9 rights as a subterfuge to strike in violation of Article 44 of the agreement. Pilot has contended that the underlying dispute arises out of the fact that the picket lines at its Kernersville terminal were not actually Local 512 picket lines but rather were International picket lines wholly supported and financed by the International, acting in concert with various locals, including Local 391. Pilot further contended that International, acting in concert with Local 391, has directly encouraged, assisted, financed, and ordered its members not to cross the picket lines it established. Consequently, Pilot has viewed this whole controversy as an attempt on the part of the union to mask the strike as being protected by the rights granted by Article 9 which presumably does permit individual employees to refuse to cross a "primary" picket line, but which would not allow the International, acting in concert with locals, to establish and finance the picket lines under the guise of being Local 512 picket lines and then encourage,

---

[1] *Monongahela Power Co. v. Local No. 2332 Int. Bro. of Elec. Wkrs.*, 484 F.2d 1209 (4th Cir. 1973), also involved a close affiliation between the "picketing" union and the "honoring" union. There, the Fourth Circuit correctly held that a federal district court had jurisdiction to grant a *Boys Markets* injunction. *Monongahela*, like this case, involved a collective bargaining agreement which contract broad mandatory arbitration provisions and an express no-strike clause.

finance, or order its members to refuse to cross such picket lines. Surely a *Boys Market* injunction is proper to enjoin such a blatant disregard of the collective bargaining contract and the arbitral process. Instead of submitting the dispute to arbitration as requested by Pilot and as required by the collective bargaining agreement, the union informed its members that they could rely on their Article 9 rights and refuse to cross the picket lines. A work stoppage in violation of the no-strike clause ensued. Until the dispute was resolved by the arbitral process, the union had no right to strike. Pilot submits that in light of the presence of the express no-strike clause, there can be no real doubt that the district court had authority to enjoin the work stoppage under the principles enunciated in *Boys Markets, supra,* and *Gateway Coal Company v. Mine Workers,* 414 U.S. 368 (1974). Petitioners' restrictive reading of *Boys Markets* is not warranted. This Court in *Boys Markets* correctly noted the shift in congressional emphasis "from protection of the nascent labor movement to the encouragement of collective bargaining and to administrative techniques for peaceful resolution of industrial dispute" through the arbitral process, and concluded that Section 301 (a) of the Labor Management Relations Act, 29 U.S.C. section 185 (a) empowers a federal court to enjoin violations of a contractual duty not to strike. 398 U.S. at 251.

Pilot asks only that it get what it bargained for in the collective bargaining agreement. As expressed by Justice Brennan in *Boys Markets* and quoted by this Court in *Gateway Coal, supra:*

> "[A] no strike obligation, express or implied, is the quid pro quo for an undertaking by the employer to submit grievance disputes to the process of arbi-

tration. . . . Any incentive for employers to enter into such an agreement is necessarily dissipated if the principal and most expeditious method by which the no-strike obligation can be enforced is eliminated." 398 U.S. at 248. (Citation omitted.)

CONCLUSION

For the foregoing reasons the Petition for Certiorari should be denied.

Respectfully submitted,

J. W. ALEXANDER, JR.
1410 North Carolina National Bank Bldg.
Charlotte, North Carolina 28202

WILLIAM KEARNS DAVIS
THOMAS RICH CRAWFORD
2111 Wachovia Building
Post Office Box 1406
Winston-Salem, N. C. 27102

Attorneys for Respondent